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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 96

UNITED STATES, PETITIONER,

vs.

BUFFALO SAVINGS BANK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED APRIL 30, 1962
CERTIORARI GRANTED JUNE 11, 1962

SUPREME COURT OF THE UNITED STATES

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IN THE COUNTY COURT—ERIE COUNTY, STATE OF NEW YORK

BUFFALO SAVINGS BANK, Plaintiff,

v.

BEVERLY VICTORY, Individually and as Administratrix of the Estate of JOSEPH B. VICTORY, also known as JOSEPH VICTORY, deceased; MARILYN M. VICTORY; DUANE B. VICTORY; THE WESTERN SAVINGS BANK OF BUFFALO; UNITED STATES OF AMERICA; B. & L. MOTORS INC.; DAVID COLE doing business under the name of DAVE COLE MOTORS, as successor in interest to DAVID COLE and EDWARD COLE, doing business as DAVE COLE MOTORS; THE GRAMATAN NATIONAL BANK AND TRUST COMPANY OF BRONXVILLE; AGNES B. THUMAN, as Executrix of the Last Will and Testament of SYLVESTER C. THUMAN, deceased; MANUFACTURERS AND TRADERS TRUST COMPANY; THE PEOPLE OF THE STATE OF NEW YORK; ALMIN JONES, Defendants.

NOTICE OF APPEAL TO APPELLATE DIVISION—Dated November 18, 1960

Please Take Notice that the United States of America, a defendant in this action, hereby appeals to the Appellate Division of the Supreme Court, for the Fourth Judicial Department from the final judgment of foreclosure and sale of the County Court entered herein in the office of the Clerk of Erie County on the 20th day of October, 1960 whereby it was adjudged that the answer of the said United States of America be stricken out, that the mortgaged premises [fol. 4] herein be sold free and clear of all local real estate taxes, assessments and water rates which will or may become liens on the premises at the time of the sale, but that such local real estate taxes, assessments and water rates be paid out of the process of the sale as an expense of the sale, and the liens of the United States of America having an earlier priority be paid thereafter, if sufficient funds remain therefor.

And Please Take Further Notice that the appellant intends to bring up for review on such appeal a memorandum

of the Court entered in the said Clerk's office on the 18th day of October, 1960, directing that the Clerk enter judgment for the relief demanded in the complaint and that said judgment provide for sale by the referee and payment of such local taxes and assessments as a cost of the sale and in priority of the liens of the United States.

Dated: Buffalo, New York, November 18, 1960.

Neil R. Farmelo, United States Attorney in and for the Western District of New York, Attorney for Defendant, United States of America, Office and Post Office Address, 502 United States Courthouse, Buffalo 2, New York. By: /s/ C. Donald O'Connor, Assistant United States Attorney.

[fol. 5] To: Little & Burt, John F. Little, Esq., of Counsel, Attorneys for Plaintiff, Buffalo Savings Bank Building, Buffalo 3, New York. Evan E. Janes, Esq., Guardian ad Litem for Defendant Marilyn M. Victory and designated attorney for Defendant Duane B. Victory, Prudential Building, Buffalo 2, New York. Moot, Sprague, Marcy & Gulick, William H. Gage and Thomas G. Ricket, Esqs., of Counsel, Attorneys for Erie County Savings Bank, Amicus Curiae, Erie County Savings Bank Building, Buffalo 2, New York.

[fol. 6] In the County Court—Erie County

Buffalo Savings Bank, Plaintiff,

v.

Beverly Victory, Individually and as Administratrix of the Estate of Joseph B. Victory, also known as Joseph Victory, deceased; Marilyn M. Victory; Duane B. Victory; The Western Savings Bank of Buffalo; United States of America; B. & L. Motors Inc.; David Cole doing business under the name of Dave Cole Motors, as successor in interest to David Cole and Edward Cole, doing business as Dave Cole Motors; The Gramatan National Bank and Trust Company of Bronxville; Agnes B. Thuman, as Executrix of the Last Will and Testament of Sylvester C. Thuman, deceased; Manufacturers and Traders Trust Company; The People of the State of New York; Alvin Jones, Defendants.

Judgment Appealed from—October 20, 1960

The above named defendant, United States of America, [fol. 7] having appealed to the Appellate Division of the Supreme Court in and for the Fourth Judicial Department, from the judgment of the County Court, Erie County, entered in the office of the Clerk of the County of Erie on June 9, 1959; and the said appeal having been duly heard, and the said Appellate Division having thereupon by its Order dated June 29, 1960, duly unanimously ordered and adjudged that the said judgment, insofar as appealed from, be reversed on the law and in the exercise of discretion and the case be remitted to this Court for further proceedings in accordance with the opinion of said Appellate Division, without costs to any party; and the said order of reversal having been duly filed in the Office of the Clerk of said Appellate Division on July 1, 1960; and a copy of said Order, together with notice of entry thereon having been duly served on the same day on Messrs. Little and Burt, the attorneys for the said plaintiff, and Neil R. Farmelo, Esq., the attorney for the defendant, United States of America, and the remittitur and record on appeal, together with certified copies of said order of reversal having duly been

remitted to the Office of the Clerk of the County of Erie, and duly filed on the 8th day of July, 1960; and plaintiff having moved for further proceedings in this Court pursuant to said order of June 29, 1960, and after having heard arguments of counsel,

Now, on motion of Little and Burt, attorneys for the said plaintiff, it is hereby

Ordered, that the said order of reversal of the Appellate [fol. 8] Division, dated June 29, 1960, be and the same hereby is made the order of this Court, and due proceedings having been had in this Court pursuant to the direction of the Appellate Division by said order of June 29, 1960, it is further

Ordered and Adjudged that the said judgment of this Court herein, dated June 9, 1959, and entered in the Office of the Clerk of the County of Erie on June 9, 1959, be and the same hereby is reversed and a new judgment based on the Decision of Honorable Burke I. Burke, Erie County Judge, dated October 18, 1960, is hereby rendered as follows:

Ordered, Adjudged and Decreed, that the answer interposed herein by the defendant, United States of America, be and the same hereby is stricken out, without prejudice to the defendant, United States of America, participating as a junior lienor in any surplus moneys remaining, as hereinafter set forth, after the payment of fees, costs, expenses of sale and plaintiff's claim for principal and interest; and it is further

Ordered, Adjudged and Decreed, that the plaintiff is entitled to have herein the sum of One Thousand Five Hundred Sixty and 13/100 Dollars ($1,560.13), the sum so due as aforesaid, with interest thereon from the 12th day of March, 1959, besides the sum of Three Hundred Twenty-seven and 90/100 Dollars ($327.90) as taxed by [fol. 9] the Clerk of the Court and hereby adjudged to the plaintiff for costs and disbursements in this action, with interest thereon from the date hereof; and it is further

Ordered, Adjudged and Decreed, that Evan E. James, Esq., is awarded the sum of One Hundred Dollars ($100.00) in full of his services as Guardian *ad litem* and Designated Attorney herein; and it is further

Ordered, Adjudged and Decreed, that the mortgaged premises described in the complaint in this action as here-

inafter set forth, be sold pursuant to Section 1087 of the Civil Practice Act at public auction at the westerly vestibule of the Erie County Hall, Buffalo, New York, by or under the direction of Robert W. McNulty of the Town of Orchard Park in the County of Erie, New York, who is hereby appointed referee for that purpose; that said referee give public notice of the time and place of such sale, according to law and the course and practice of this Court; that the plaintiff, or any other party to this action, may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed of premises sold. That the said referee shall, as a part of the expenses of the sale, pay out of the proceeds of said sale all real estate taxes, assessments and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid real estate taxes, assessments or water rates which have not apparently become absolute.

[fol. 10] That said referee forthwith, upon receipt of the proceeds of sale or any part thereof, deposit the same in his own name as referee, in the Liberty Bank of Buffalo and that said referee, after the delivery of said deed, pay from the moneys so deposited the referee's legal fees, the allowance to the Special Guardian, the allowance to the Designated Attorney, and the lawful advertising expenses, and pay all real estate taxes and assessments and water rates which were liens upon the property sold, and pay the cost of redeeming said property from any real estate taxes, assessments and water rates which had not apparently become absolute; unless he shall have allowed them to the purchaser as hereinbefore provided, and then to pay to the plaintiff or its attorney the aforesaid costs, disbursements and allowances, with interest, and also pay the said amount hereinbefore adjudged due the plaintiff, with interest, or so much thereof as said moneys will pay, and deposit the surplus, if any then remaining, as hereinafter provided, taking receipts for all such payments and filing the same with his report of sale.

That said referee shall make a report of such sale, and file it with the Clerk of Erie County; and if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with interest and costs, disbursements

and allowances with interest as aforesaid, that said referee specify the amount of such deficiency in his report of sale, and that the defendant, Beverly Victory, as Administratrix [fol. 11] of the Estate of Joseph B. Victory (also known as Joseph Victory), deceased, pay the same to the plaintiff, and upon application, as required by law, that the plaintiff have judgment and execution therefor, or so much thereof as the Court may determine to be just and equitable of the debt remaining unsatisfied; but if there be a surplus, then that said referee shall deposit the same, within five days after its ascertainment, with the Liberty Bank of Buffalo, to the credit of this action, but subject to the further order of the Court herein.' Further ordered that the purchaser or purchasers at such sale be let into possession on production of the referee's deed or deeds.

That in case the plaintiff becomes the purchaser of the said mortgaged premises at said sale, or in the event that the rights of the purchaser at said sale and the terms of sale under this Judgment shall be assigned to or shall be acquired by the plaintiff and a valid assignment thereof be delivered to said referee, said referee shall not require the plaintiff to pay in cash the entire amount bid at said sale, but shall execute and deliver to the plaintiff a deed of the premises sold upon the payment to said referee of the amounts hereinbefore specified as taxed by the Clerk of this Court and adjudged to the plaintiff for costs and disbursements, with interest thereon from the date hereof, the amounts of the aforesaid real estate taxes, assessments and water rates and interest and penalties thereon, and the amounts necessary to redeem the property sold from any sales for unpaid real estate taxes, assessments or water [fol. 12] rates, or, in lieu of the payments of said last mentioned amounts, upon delivering to said referee receipts of proper municipal authorities showing the payment thereof, together with the referee's fees, advertising expenses, and the allowance to the Special Guardian and Designated Attorney, all of which shall be allowed to the plaintiff and applied by the said referee accordingly. If after such application and allowing the plaintiff from the amount for which the property shall have sold as aforesaid, there shall remain of the amount so bid, a surplus over and above the amount due the plaintiff, the plaintiff shall pay to said

referee upon delivery to it or its assigns of said referee's deed the amount of such surplus, and said referee shall thereupon forthwith pay with and out of the same, said real estate taxes, assessments and water rates and interest or penalties thereon unless the same have already been paid, and shall then deposit the balance in said depository as hereinbefore directed.

That said referee take the receipt of the plaintiff, or its attorneys, for the amounts paid as hereinbefore directed and file same with his report of sale; that he deposit the surplus moneys, if any, with the Liberty Bank of Buffalo, within five days after the same shall have been received by him to the credit of this action to be withdrawn only on the order of this Court.

That if the proceeds of the sale be insufficient to pay the amounts so reported due to the plaintiff as aforesaid with [fol. 13] the expenses of sale, interest, costs, allowance, and the real estate taxes, assessments and water rates and interest as aforesaid, that said referee specify the amount of such deficiency in his report of sale and that the defendant, Beverly Victory, as Administratrix of the Estate of Joseph B. Victory (also known as Joseph Victory), deceased, pay the same to the plaintiff, and that the said plaintiff have Judgment and execution therefor upon application as hereinbefore provided; and it is further,

Ordered, Adjudged and Decreed, that each and all of the defendants in this action and all persons claiming under them or any or either of them, after the filing of the notice of pendency of this action, be, and they hereby are, forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the said mortgaged premises and each and every part thereof, except as to the one year period of redemption granted the defendant, United States of America, by Section 2410 of Title 28 of the United States Code Annotated.

The following is a description of the said mortgaged premises hereinbefore mentioned:

All that Tract or Parcel of Land situate in the City of Buffalo, County of Erie and State of New York, bounded and described as follows:

Commencing at a point in the northerly line of Lyth Place, three hundred forty-three and two-tenths (343.2)

feet westerly from its intersection with the westerly [fol. 14] line of Jefferson Street; running thence westerly along said line of Lyth Place twenty-four and four-tenths (24.4) feet; thence northerly at right angles one hundred twenty (120) feet to a point midway between the northerly line of Lyth Place and the south line of Northland Avenue, formerly Puffer Street; thence easterly along the line midway between said lines of Lyth Place and Northland Avenue, formerly Puffer Street, twenty-four and four-tenths (24.4) feet; thence southerly at right angles one hundred twenty (120) feet to the northerly line of Lyth Place at the place of beginning.

Subject to restrictions and rights of utilities of record affecting said premises.

Together With all the right, title and interest of the mortgagor of, in and to the land lying in the bed of any street, road, avenue, lane or right of way as they now exist or formerly existed in, in front of or adjoining the said premises, and in and to all easements, riparian rights and appurtenances and all the estate and rights of the mortgagor in and to said premises.

Together With all fixtures and articles of personal property, now or hereafter attached to, and used in connection with, the above described premises, all of which are covered by said mortgage.

s/ Burke I. Burke, Erie County Judge.

[fol. 15] Granted: October 20, 1960.

s/ O. E. Mueller, Special Deputy Clerk.

IN THE COUNTY COURT OF ERIE COUNTY

NOTICE OF MOTION FOR JUDGMENT—Dated July 28, 1960

Sirs:

Please Take Notice that on the annexed Order of the Appellate Division, Fourth Department, dated June 29, 1960, remitting this matter to the Erie County Court for further proceedings in accordance with the Opinion of said Appellate Division, Fourth Department, the annexed affidavit of John H. Little, verified the 28th day of July, 1960, and the annexed proposed judgment, and application will be made in Erie County Court, Part I, in the Erie County Hall, City of Buffalo, Erie County, New York, on the 4th day of August, 1960, at 9:30 A. M. of that day, or as soon thereafter as counsel can be heard, for the necessary proceedings to enable said County Court to enter a judgment in this matter in accordance with the direction of the Appellate Division, Fourth Department.

Dated: Buffalo, New York, July 28th, 1960.

Yours, etc., Little and Burt, Attorneys for Plaintiff, Office and P. O. Address, Buffalo Savings Bank Bldg., 545 Main Street, Buffalo 3, New York.

[fol. 16] To: Neil R. Farmelo, Esq., Attorney for Defendant, United States of America. Evan E. James, Esq., Guardian ad Litem for Defendant, Marilyn M. Victory. Designated Attorney for Defendant, Duane B. Victory. Messrs. Moot, Sprague, Marcy & Gulick, Attorneys for Erie County Savings Bank, Amicus Curiae.

AFFIDAVIT OF JOHN H. LITTLE IN SUPPORT OF MOTION

STATE OF NEW YORK,

County of Erie, City of Buffalo, ss.:

JOHN H. LITTLE, being duly sworn, deposes and says that he is a member of the firm of Little and Burt, attorneys for the plaintiff, Buffalo Savings Bank, and has had charge of this action since its inception.

That the defendant, United States of America, appealed

to the Appellate Division, Fourth Department, from the final judgment of foreclosure and sale in this action entered in the Office of the Clerk of Erie County June 9, 1959, inso-
[fol. 17] far as it was adjudged that the Answer of the United States of America be stricken out, that the mortgaged premises be sold subject to all local real estate taxes, assessments and water rates, and that the lien of the United States of America be foreclosed.

Thereafter said appeal was argued in the Appellate Division, Fourth Department, and by an order dated June 29, 1960, the Appellate Division, Fourth Department, ordered that the judgment of foreclosure entered herein June 9, 1959, be unanimously reversed on the law and in the exercise of discretion, and that the case be remitted to the Erie County Court for further proceedings in accordance with the opinion of the Court.

That plaintiff now moves this Court for such further proceedings, in accordance with the order of the Appellate Division, Fourth Department, dated June 29, 1960 and for the entry of a new judgment.

That the answer of the United States of America raises no issue of fact and should be dismissed as it was in the original judgment of June 9, 1959, without prejudice to the United States of America to participate as a junior lienor in any surplus moneys remaining after the payment of fees, costs, and expenses of sale (including real estate taxes, assessments and water rates) and plaintiff's claim for principal and interest. The tax lien of the defendant, United States of America, is subordinate to the lien of plaintiff's mortgage and should be foreclosed, with pro-
[fol. 18] vision that the one year period of redemption granted the United States of America by Section 2410 of Title 28 of the United States Code Annotated be preserved by proper recital in the resettled judgment.

That only affirmative relief sought in this action is to obtain the foreclosure of plaintiff's real estate mortgage. Plaintiff concedes that all real estate taxes, assessments and water rates assessed by the municipal authorities within whose bounds the mortgage property lies, are superior to the lien of plaintiff's mortgage no matter if they were levied and assessed before or after the recording of plaintiff's mortgage. Nothing will be gained by bringing in as

parties defendant the City of Buffalo, County of Erie and Buffalo Sewer Authority in an effort to cut off the lien of their taxes and direct that the mortgaged premises be sold free of said taxes, assessments and water rates, since plaintiff cannot succeed in this. Any adjudication as to the relative priority of United States of America's Federal tax lien and said real estate taxes, assessments and water rates is immaterial to the only issue in this law suit, namely, the foreclosure of plaintiff's first real estate mortgage.

The Appellate Division, Fourth Department, in its opinion of July 1, 1960, specifically rejected the request of the defendant, United States of America, that the judgment provided that the problem of the circular priorities be solved by providing in the judgment that, out of the net proceeds of sale, *i. e.*, the funds remaining after payment [fol. 19] of the expenses of sale (not including local taxes) and the plaintiff's costs, there be set aside a sum equivalent to the total of the amount owing on the plaintiff's mortgage and the amount of any other liens superior to the Federal tax lien; that thereafter the Federal tax lien be paid and then the local taxes be paid and that, if there is not enough left to pay the local taxes in full, the balance owing on the local taxes be paid out of the sum orginally set aside and that only the balance then remaining of that sum be paid over to the plaintiff and the other lienors for whose benefit the sum had been set aside.

That since Section 1087 of the New York Civil Practice Act provides for only two methods of conducting a mortgage foreclosure sale, namely, that the referee shall pay the real estate taxes, assessments and water rates as a part of the expenses of sale, unless the Court directs the property to be sold subject to real estate taxes, assessments and water rates, and since the Appellate Division, Fourth Department, has ruled that this Court erred as a matter of law and in its exercise of discretion in directing that the property be sold subject to real estate taxes, assessments and water rates, plaintiff respectfully requests that the resettled judgment shall direct that the said referee shall, as a part of the expenses of the sale, pay out of the proceeds of said sale all real estate taxes, assessments and water rates which are liens upon the property

sold and redeem the property sold from any sales for unpaid real estate taxes, and assessments and water rates [fols. 20-28] which have not apparently become absolute, or he may allow the same to the purchaser as a part of the expenses of the sale, at the time of delivering said deed, upon the production and delivery by said purchaser to the said referee of proper vouchers showing the payment thereof.

John H. Little.

(Sworn to on July 28, 1960.)

In the County Court of Erie County

[fol 29] Little & Burt, John F. Little, Esq., of counsel, Attorneys for Plaintiff.

John O. Henderson, Esq., United States Attorney, William I. Shapiro, Esq., Special Assistant to the United States Attorney, and Donald O'Connor, Esq., Assistant United States Attorney, of counsel, Attorney for Defendant, United States of America.

Evan E. James, Esq., Guardian *ad litem* for Defendant, Marilyn M. Victory, and designated attorney for Defendant, Duane S. Victory.

Moot, Sprague, Marcy & Gulick, Thomas G. Rickert, Esq., of counsel, Attorneys for Erie County Savings Bank, *Amicus Curiae*.

Memorandum Opinion of Hon. Burke I. Burke, Dated October 18, 1960

The plaintiff, Buffalo Savings Bank, and the defendant, United States of America, have appeared before this court on the return day of a motion made by plaintiff for a resettled judgment of foreclosure and sale. A review of the prior proceedings in this matter may serve to clarify the issues presented.

The action was started by plaintiff in October, 1958, to foreclose a first mortgage. The defendants in the action, in addition to the mortgagors, included the holder of a second mortgage, various judgment creditors, and the United

States of America, which was made a party by virtue of a federal tax lien filed subsequent to the recording of the [fol. 30] first mortgage but prior to the accrual of certain local real estate taxes, unpaid at the time of the commencement of the action, and remaining unpaid to the present time.

The complaint requested a judgment establishing the amount due for principal and interest on the first mortgage, together with any moneys advanced by the mortgagee to pay local taxes, and that the mortaged premises be sold to satisfy these amounts and the cost and expenses of the foreclosure action, and that all defendants made parties to the action be foreclosed from any interest in the property. The United States of America served an answer requesting that the judgment of foreclosure require the referee to pay from the proceeds of sale the tax lien of the United States of America prior to the payment of any other unpaid taxes and other charges.

Thereafter, the plaintiff moved for summary judgment and this court granted the motion for summary judgment on the basis that no question of fact had been raised by the pleadings since the lien dates and amounts had been admitted and the only dispute was a question of law as to the priorities to be determined upon the agreed facts. At that time, the court also directed entry of a judgment providing that the mortgaged premises be sold by the referee subject to unpaid local municipal real estate taxes but free of the liens of all other defendants in the action, including United States of America.

The defendants, United States of America, appealed. [fol. 31] from this order and the Appellate Division reversed the judgment of foreclosure insofar as the same had been appealed from by the United States and remitted the case to this court for further proceedings in accordance with the opinion of the Appellate Division.

The opinion notes that a sale of the mortgaged premises, subject to local taxes, while within the power of the trial court, was not appropriate under the particular circumstances and suggested that the premises be sold free and clear of all liens, and that the municipal lienors be made parties to the action. The municipal lienors have not been made parties to the action for the following reason: upon

argument of the present motion, attorneys for the plaintiff and the defendant, United States of America, discussed the matter and it was indicated that if the municipal lienors were made parties, they would be in a position like that of a first mortgagee, made a party to a second mortgage foreclosure action; that is, such lienors would be entitled to have the action dismissed as to them or, in the alternative, to judgment of the court directing that the premises foreclosed, be sold subject to their liens, and that no useful purpose would be served.

There remains again the question of the form of judgment directing the sale, the answer being stricken under the authority of Aquilino v. United States, 3 New York 2d 511. The plaintiff has requested a judgment of foreclosure and sale pursuant to Section 1087 of the New York Civil Practice Act, one directing that the referee sell the [fol. 32] premises and pay out of the proceeds taxes, assessments and water rates which are liens upon the property sold. Under this form of judgment, any such taxes paid by the referee would, pursuant to Section 1087 of the Civil Practice Act, be deemed expenses of the sale, which have priority over all other claims.

The defendant, United States of America, has requested a form of judgment directing that the proceeds of sale be apportioned to the payment of expenses of the sale (except local taxes) and the allocation of the remaining proceeds to the payment of the plaintiff's mortgage and all other liens in order of time, but that if the local taxes are not fully paid after such allocation, that the balance of the local taxes be paid out of the proceeds allocated to the various lienors (excepting the United States of America) in inverse order of their priority in time.

The plaintiff relies upon *Rikoon* v. *Two Boro Dress Co.*, 9 M 2d 591, 171 NYS 2d 19 Mod., 8 A. D. 2d 986, 190 NYS 2d 799 (2d Dep't.) reargued 9 *A.* D. 2d 783, 193 NYS 2d 302, leave to appeal denied, 7 NY 2d 711, while the defendant, United States of America, relies upon *United States* v. *New Britain*, 347 U. S. 81 (1954) as applied in *Dunkirk Trust Co.* v. *Dunkirk Laundry Co.*, 17 M 2d 298, 182 NYS 2d, 381 and *Stadelman* v. *Hornell Woodworking Corp.*, 172 F Supp. 156 (D. C. N. Y. 1958) and also *Prudential Sav-*
[fol. 33] *ings Bank* v. *Prieur et al.*, not reported (Supreme

Court, Erie County 1959). The plaintiff's contention is also supported by *Kronenberg v. Ellenville Nurseries and Greenhouses*, 196 NYS 2d 106, Supreme Court, Ulster County, 1960.

As the Appellate Division noted, it is only in the event that the net proceeds from the sale of the premises are in excess of the amount owing on the plaintiff's mortgage and other liens superior to the federal tax lien, but less than the amount needed to pay all liens in full, that the question of priority of the federal tax lien over local taxes (if any) will arise. In its previous decision, (similar to that of the Supreme Court of Nassau County in Feinstein v. Earl, N. Y. Law Journal, July 5, 1960) this court directed that the premises be sold subject to local real estate taxes.

Since, however, a sale, subject to local taxes, now may not be directed, the question remains whether the court should direct the entry of a judgment of foreclosure and sale in the usual form under Section 1087 of the New York Civil Practice Act, or whether it should grant the special form of judgment requested by the United States of America.

The authority principally relied upon by the defendant, United States of America, is the case of *United States v. New Britain*, 347 U. S. 81 (1954). That case involved the foreclosure by judgment sale of two mort- [fol. 34] gages on real property located in the State of Connecticut. The premises subject to the mortgages brought a gross sum of some $28,000.00 on the sale and pursuant to Connecticut practice, the gross proceeds of the sale were paid into Court, and an application made for a supplementary judgment directing the disposition of these proceeds. There were claims totaling $31,000.00 for expenses of the sale, the two mortgages, a judgment of record and statutory tax liens asserted by the municipality and by the United States. The court below had directed that from the proceeds of sale, the expenses, the local municipal tax liens, the mortgages, the judgment liens and the United States liens be paid in that order, reasoning that the mortgagee could have paid the delinquent local taxes and added the amount thereof to the debt covered by the mortgage liens, which would then have priority over the federal lien, and stating that it did not believe Congress intended, by giving mortgagees and certain judg-

ment creditors priority over federal tax liens, to supersede state laws making certain municipal taxes superior in turn to such mortgages and judgments, and that accordingly this Congressional intent was to subordinate federal liens to such other encumbrances as have priority over the mortgages and judgment liens to which the federal liens are expressly subordinated by federal statute.

In reversing, the United States Supreme Court stated that it did not agree, holding that the United States was [fol. 35] not interested in whether the state received its taxes and water rents prior to mortgagees and judgment creditors since that was a matter of state law, but that as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien and that there was nothing in the language of the federal statute to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interest set out therein.

The various Connecticut sfatutes cited by the United States Supreme Court in the New Britain case involved either the priority of local municipal taxes or the privilege given to the mortgagee to pay such preferred items and add them to the principal due on the mortgage.

However, an examination of the general statutory pattern of mortgage foreclosure procedure in the State of Connecticut reveals that both at the time of the decision of the New Britain case and at present, when a mortgage is foreclosed in Connecticut, the proceeds of the sale of the premises are brought into the court directing the sale, and that thereafter a supplemental judgment is rendered specifying the parties who are entitled to the proceeds of the sale and the amount to which each is entitled. These parties include the plaintiff, although if the plaintiff purchases the premises at the foreclosure sale, he need only bring into court the excess of the sale proceeds over the amount due [fol. 36] on his judgment debt, interest and costs. It is also provided that the plaintiff in a foreclosure action be paid his judgment for principal and interest and his costs, but these costs are not defined and the statute indicates they are to be the costs usually allowed to successful parties. See 49 Conn. Gen. Stat. c. 846 §§ 49-27, 49-29 (1958 Rev.).

By comparison, the New York practice involving foreclosure of mortgages provides in Section 1082 of the Civil Practice Act, that in an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment the court must direct the sale of the mortgaged premises, or such portion thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action, and all surplus moneys arising from the sale of the mortgaged premises shall be deposited by the referee within five days after the sale shall have been held, subject to the further order of the court. Any person claiming the surplus moneys arising upon the sale of the mortgaged premises must initiate a separate surplus moneys proceeding.

Section 1087 of the Civil Practice Act expressly provides that where a judgment rendered in an action to foreclose a mortgage upon real property directs the sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold and redeem the property sold from any [fol. 37] sales for unpaid taxes, assessments or water rates which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale.

It appears there is a distinction between the procedure mandated by the Connecticut statutes and that mandated by the New York statutes. The Connecticut statutes cover disposition of the proceeds of sale, which are analogous to but not identical with the surplus moneys resulting upon a sale in New York.

The form of judgment requested by the defendant, United States of America, goes beyond what is provided for by New York procedure and would, in effect, initiate a surplus moneys proceeding on behalf of the United States of America prior to the sale, which might or might not produce surplus moneys. The United States seeks this special form based upon the assertion that the normal form of judgment would vitiate its claimed priority and that this would be illegal under the federal law which the United States claims is controlling in this instance. It is the court's opinion that this is a matter of state procedure, and

that under the recent decisions in *U.S.* v. *Brosnan*, 80 S. Ct. 1108 (1960) the United States Supreme Court stated it was desirable to adopt as federal law, state law governing divestiture of federal tax liens except to the extent that Congress may have entered the field, and accordingly re- [fol. 38] fused to fashion a federal rule of uniformity respecting the extinguishment of federal junior liens under state procedures. In holding, in these particular cases, that federal liens could be effectively extinguished by non-judicial foreclosures of mortgages and deeds of trust, it would seem that the court indicated there could be a permissible variation of effect upon federal tax liens depending upon the methods of state procedure utilized by the security holder. These statements are consonant with the form of judgment granted in the *Rikoon* and *Kronenberg* cases cited *supra*.

Apart from the legal factors, policy considerations include the following:

The form of judgment requested by the defendant United States of America, would jeopardize the standing of two mortgages and judgments recorded prior to the filing of the United States tax lien merely by reason of the accrual of subsequent real estate taxes. Such a circumstance, subsequent to the docketing of a federal tax lien, should not affect the standing of prior recorded liens, nor furnish the federal government with an advantage over other creditors.

The effect of such a determination would be to spur mortgagees to foreclose immediately upon a tax default, or require substantial escrow deposits by mortgagors to secure payment of subsequent real estate taxes.

[fol. 39] And, if the government's contention were sustained, it could lead to the paradoxical result, in other cases factually similar, wherein U. S. government agencies are cast as bond and mortgage guarantors, that a mortgagee, in effect, would be compelled to pay a mortgagor's income tax to one department of the federal government, Internal Revenue, and then be reimbursed by a different department of the federal government such as the Veterans Administration or the Federal Housing Administration.

As it appears that there is a meaningful difference between the Connecticut procedures involved in the New Britain case and the statutory procedural scheme of New

York set forth in the Civil Practice Act, that the form of judgment requested by the United States of America is at variance with mortgage foreclosure procedure under New York law, and that upon the authority of the Rikoon and Kronenberg cases, the relief asked by plaintiff should be granted, it is the decision of the court that the plaintiff have a judgment of foreclosure and sale, pursuant to Section 1087 of the Civil Practice Act, directing the referee to pay real estate taxes and assessments from the proceeds of sale as expenses, and providing that the United States of America may redeem within one year of the date of sale.

Submit judgment accordingly.

Dated: October 18, 1960. Buffalo, New York.

Burke I. Burke.

[fol. 40] In the Supreme Court of New York
Appellate Division—Fourth Department

Buffalo Savings Bank, Respondent,

vs.

Beverly Victory, and others, Defendants,

United States of America, Appellant.

No. 198

Argued: May 5, 1960

Per Curiam Opinion—July 1, 1960

Present: Hon. Alger A. Williams, *Presiding Justice*. Hon. Earle C. Bastow, Hon. Harry D. Goldman, Hon. Philip Halpern, Hon. William E. McClusky, *Associate Justices*.

Appeal from Judgment of Erie County Court, Burke, J., striking out the answer of the United States of America, granting summary judgment, and directing sale of the mortgaged premises.

Judgment entered June 9, 1959.

[fol. 41] APPEARANCES:

Little & Burt, Attorneys for Respondent, John H. Little of counsel.

Neil R. Farmelo, Acting United States Attorney, Attorney for Appellant, William Schapiro, of counsel.

Moot, Sprague, Marcy & Gulick, Attorneys for Erie County Savings Bank, *Amicus Curiae*, Thomas G. Rickert, of counsel.

PER CURIAM:

The direction in the judgment of foreclosure that the mortgaged premises be sold "subject to all local real estate taxes, assessments and water rates, which are or may become liens on the premises at the time of the sale" is not a proper direction under the circumstances of this case. Under section 1087 of the Civil Practice Act, local real estate taxes, assessments and water rates which are liens upon the property must be paid out of the proceeds of the sale by the officer making the sale "unless the judgment otherwise directs". This authorizes the court to direct a sale of mortgaged premises subject to local taxes in an appropriate case but this authority may not properly be exercised in a case such as this in which there is a problem of circular priorities. While the lien of the local taxes is admittedly superior to the lien of the plaintiff's [fol. 42] mortgage, the appellant United States contends that the lien of the local taxes is inferior to the Federal tax lien by reason of the fact that the Federal tax lien was filed prior to the accrual of the local taxes, but it concedes that the Federal tax lien is, in turn inferior to the mortgage lien, having been filed after the mortgage was recorded. To direct that the property be sold subject to the lien of local taxes in this situation is, in effect, to give the lien of the local taxes a super-priority, in disregard of the fact that the lien of the local taxes is claimed to be inferior to the Federal tax lien. The amount realized upon the sale would undoubtedly reflect the fact that the property had been sold subject to the lien of the local taxes and the proceeds of the sale available for the payment of all other liens, including the Federal tax lien, would be accordingly reduced.

We therefore reverse the direction to sell the property subject to local taxes and we also reverse the provision of the judgment striking out the answer of the appellant and we remit the case to the County Court for the entry of a new appropriate judgment which recognizes the respective priorities claimed.

The appellant requests that the problem of the circular priorities be solved by providing in the judgment that, out of the net proceeds of sale, *i.e.*, the funds remaining after payment of the expenses of sale (not including local taxes) and the plaintiff's costs, there be set aside a sum [fol. 43] equivalent to the total of the amount owing on the plaintiff's mortgage and the amount of any other liens superior to the Federal tax lien; that thereafter the Federal tax lien be paid and then the local taxes be paid and that, if there is not enough left to pay the local taxes in full, the balance owing on the local taxes be paid out of the sum originally set aside and that only the balance then remaining of that sum be paid over to the plaintiff and the other lienors for whose benefit the sum had been set aside. This request is made upon the authority of United States vs. New Britain, 347 U. S. 81 (see also Metropolitan Life Ins. Co. vs. United States, 9 A. D. 2d 356; but see Rikon vs. Two Boro Dress, Inc., 9 A. D. 2d 783, lv. to appeal denied 7 N. Y. 2d 711).

However, there is no way of determining in advance of the sale whether the question of priorities sought to be raised by the appellant will ever arise. If the net proceeds of sale are not sufficient to pay the amount owing on the plaintiff's mortgage and on any other liens superior to the Federal tax lien, there will concededly be nothing left to apply on the Federal tax lien and therefore no question will arise as to the effect to be given to the superiority of the Federal lien over the lien of local taxes. Similarly, if the net proceeds of sale are sufficient to pay all liens, including both the Federal tax lien and local taxes in full, no question of priorities will arise. It is only in the event that net proceeds are in excess of the amount owing on the plaintiff's mortgage and on any other liens superior to [fol. 44] the Federal tax lien, but less than the amount needed to pay all liens in full, that the question of the effect to be given to the priority of the Federal tax lien over local taxes will arise.

In this situation, it may well be that the best way to dispose of the matter is to have the premises sold free and clear of all liens, without determining the manner of distribution of the proceeds prior to the sale, leaving the question of priorities to be decided later, if it should become necessary to do so. However, the court cannot authorize the sale of the premises free and clear of all liens, in the manner suggested, unless all the parties holding liens are made parties to the action. The City of Buffalo, the County of Erie and the Buffalo Sewer Authority are not now parties. They should be made parties either by service of a supplemental summons or by the service upon them of the appellant's answer with an appropriate summons (treating the so-called affirmative defense in the answer as a counter-claim against the holders of local tax liens; see Civil Practice Act, § 271).

The judgment of foreclosure, insofar as appealed from, should therefore be reversed and the case remitted to the County Court for further proceedings.

[fol. 45] In the Supreme Court of New York, Appellate Division—Fourth Department

Buffalo Savings Bank, Respondent,

vs.

Beverly Victory, Individually and as Admx. of the Estate of Joseph B. Victory, a k a Joseph Victory, deceased; Marilyn M. Victory; Duane B. Victory; The Western Savings Bank of Buffalo; B. & L. Motors, Inc.; David Cole d b a Dave Cole Motors, as successor in interest, etc.; The Geamatan National Bank and Trust Company of Bronxville; Agnes B. Thuman, as Executrix, etc. of Sylvester C. Thuman, deceased; Manufacturers and Traders Trust Company; the People of the State of New York; Alvin Jones, Defendants,

United States of America, Appellant.

Order—July 1, 1960

The above named United States of America, one of the defendants in this action, having appealed to the Appellate [fol. 46] Division of the Supreme Court Fourth Department, from certain parts of a judgment of the Erie County Court, entered in the office of the Clerk of the County of Erie, on the 9th day of June, 1959, and the said appeal having been argued by Mr. William Schapiro of counsel for the appellant, and by Mr. John H. Little of counsel for the respondent, and submitted by Mr. Thomas G. Rickert, counsel for Erie County Savings Bank, *amicus curiae*, and due deliberation having been had thereon

It is hereby Ordered, That the judgment of foreclosure, insofar as appealed from be, and the same hereby is, unanimously reversed on the law and in the exercise of discretion, and the case is hereby remitted to the Erie County Court for further proceedings in accordance with the opinion herein, without costs of this appeal to any party.

Per Curiam Opinion.

Enter.

Alger A. Williams.

Entered 1st day of July, 1960.

Herbert E. Wait, Clerk.

[fol. 47] Supreme Court, Appellate Division, Fourth Judicial Department

Clerk's Office, Rochester, N. Y.

I, Herbert E. Wait, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order made by said court upon the appeal in the within entitled action or proceeding, and the whole thereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 1st day of July, 1960.

Herbert E. Wait, Clerk.

[fol. 48] In the County Court—Erie County

Buffalo Savings Bank, Plaintiff,

vs.

Beverly Victory, individually and as Administratrix of the Estate of Joseph B. Victory, also known as Joseph Victory, deceased; Marilyn M. Victory; Duane B. Victory; The Western Savings Bank of Buffalo; United States of America; B. & L. Motors Inc.; David Cole, doing business under the name of Dave Cole Motors, as successor in interest to David Cole and Edward Cole, doing business as Dave Cole Motors; The Gramatan National Bank and Trust Company of Bronxville; Agnes B. Thuman, as Executrix of the Last Will and Testament of Sylvester C. Thuman, deceased; Manufacturers and Traders Trust Company; The People of The State of New York; Alvin Jones, Defendants.

30 Lyth Avenue.

Judgment Reversed by Appellate Division, Decision of July 1, 1960

On the Summons and Complaint, duly filed in this action [fol. 49] and all proceedings therein and on the decision of Honorable Burke I. Burke, Erie County Judge, dated June

1959, wherein he found that the answer of the defendant, United States of America, should be stricken out and that the sum of One Thousand Five Hundred Sixty and 13/100 Dollars ($1,560.13) was due thereon to the plaintiff on March 12, 1959, that plaintiff's mortgage was and is a first lien on the mortgaged premises, that plaintiff is entitled to judgment of foreclosure and sale, and that the mortgaged premises cannot be sold in parcels.

Now, on motion of Little and Burt, attorneys for the plaintiff, it is

Ordered, Adjudged and Decreed, that the answer interposed herein by the defendant, United States of America be and the same hereby is stricken out, and it is further

Ordered, Adjudged and Decreed, that the plaintiff is entitled to have herein the sum of One Thousand Five Hundred Sixty and 13/100 Dollars ($1,560.13), the sum so due as aforesaid, with interest thereon from the 12th day of March, 1959, besides the sum of Three Hundred Twenty-seven and 90/100 Dollars ($327.90) as taxed by the Clerk of the Court and hereby adjudged to the plaintiff for costs and disbursements in this action, with interest thereon from the date hereof; and it is further

Ordered, Adjudged and Decreed, that Evan E. James, Esq., is awarded the sum of $100.00 in full of his services [fol. 50] as Guardian *ad Litem* and Designated Attorney herein, and it is further

Ordered, Adjudged and Decreed, that the mortgaged premises described in the complaint in this action as hereinafter set forth, be sold, at public auction at the westerly vestibule of the Erie County Hall, Buffalo, New York, by or under the direction of Robert W. McNulty of the Town of Orchard Park in the County of Erie, New York, who is hereby appointed referee for that purpose; that said referee give public notice of the time and place of such sale, according to law and the course and practice of this Court; that the plaintiff, or any other party to this action, may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed of the premises sold. That the mortgaged premises herein described be sold, subject to all local real estate taxes, assessments and water rates, which are or may become

liens on the premises at the time of the sale, together with such interest or penalties as may have lawfully accrued thereon to the date of payment, payment of which is necessary to perfect or pass clear title to the said premises on the terms hereof and of said sale;

That said referee forthwith, upon receipt of the proceeds of sale or any part thereof, deposit the same in his own name as referee, in the Liberty Bank of Buffalo and that said referee, after the delivery of said deed, pay from the [fol. 51] moneys so deposited the referee's legal fees and the lawful advertising expenses, and then to pay to the plaintiff or its attorneys the aforesaid costs, disbursements and allowances, with interest, and also the said amount hereinbefore adjudged due the plaintiff, with interest, or so much thereof as said moneys will pay, and deposit the surplus, if any, as hereinafter provided, taking receipts for all such payments and filing the same with his report of sale.

That said referee shall make a report of such sale and file it with the Clerk of Erie County; and if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with interest and costs, disbursements and allowances with interest as aforesaid, that said referee specify the amount of such deficiency in his report of sale, and that the defendant, Beverly Victory, as Administratrix of the Estate of Joseph B. Victory (also know as Joseph Victory), deceased, pay the same to the plaintiff, and that the plaintiff have judgment and execution therefor, or so much thereof as the Court may determine to be just and equitable of the debt remaining unsatisfied; but if there be a surplus, then that said referee shall deposit the same, within five days after its ascertainment, with the Liberty Bank of Buffalo, to the credit of this action, but subject to the further order of the Court herein. Further ordered that the purchaser or purchasers at such sale be let into possession on production of the referee's deed or deed's. [fol. 52] That in case the plaintiff becomes the purchaser of the said mortgaged premises at said sale, or in the event that the rights of the purchaser at said sale and the terms of sale under this Judgment shall be assigned to or shall be acquired by the plaintiff and a valid assignment thereof be delivered to said referee, said referee shall not require the

plaintiff to pay in cash the entire amount bid at said sale, but shall execute and deliver to the plaintiff a deed of the premises sold upon the payment to said referee of the amounts hereinbefore specified as taxed by the Clerk of this Court and adjudged to the plaintiff for costs and disbursements, with interest thereon from the date hereof, together with the allowance hereby awarded to the plaintiff, in addition to said costs, with interest thereon from the date hereof, together with the referee's fees, advertising expenses, all of which shall be allowed to the plaintiff and applied by the said referee accordingly. If after such application and allowing the plaintiff from the amount for which the property shall have sold as aforesaid, there shall remain of the amount so bid, a surplus over and above the amount due the plaintiff, the plaintiff shall pay to said referee upon delivery to it or its assigns of said referee's deed and the amount of such surplus, and said referee shall thereupon deposit the balance in said depository as hereinbefore directed.

That said referee take the receipt of the plaintiff, or its [fol. 53] attorneys, for the amounts paid as hereinbefore directed and file same with his report of sale; that he deposit the surplus moneys, if any, with the Liberty Bank of Buffalo, within five day after the same shall have been received by him to the credit of this action to be withdrawn only on the order of this Court.

That if the proceeds of the sale be insufficient to pay the amounts so reported due to the plaintiff as aforesaid with the expenses of sale, interest, costs, allowances, that said referee specify the amount of such deficiency in his report of sale and that the defendant, Beverly Victory, as Administratrix of the Estate of Joseph B. Victory (also known as Joseph Victory), deceased, pay the same to the plaintiff, and that the said plaintiff have Judgment and execution therefore as hereinbefore provided; and it is further

Ordered, Adjudged and Decreed, that each and all of the defendants in this action and all persons claiming under them or any or either of them, after the filing of the notice of pendency of this action, be, and they hereby are, forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the said mortgaged premises and each and every part thereof.

The following is a description of the said mortgaged premises hereinbefore mentioned:

All That Tract or Parcel of Land situate in the City of Buffalo, County of Erie and State of New York, bounded and described as follows:

[fol. 54] Commencing at a point in the northerly line of Lyth Place, three hundred forty-three and two-tenths (343.2) feet westerly from its intersection with the westerly line of Jefferson Street; running thence westerly along said line of Lyth Place twenty-four and four-tenths (24.4) feet; thence northerly at right angles one hundred twenty (120) feet to a point midway between the northerly line of Lyth Place and the south line of Northland Avenue, formerly Puffer Street; thence easterly along the line midway between said lines of Lyth Place and Northland Avenue, formerly Puffer Street, twenty-four and four-tenths (24.4) feet; thence southerly at right angles one hundred twenty (120) feet of the northerly line of Lyth Place at the place of beginning.

Subject to restrictions and rights of utilities of record affecting said premises.

Together With all the right, title and interest of the mortgagor of, in and to the land lying in the bed of any street, road, avenue, lane or right of way as they now exist or formerly existed in, in front of an adjoining the said premises, and in and to all easements, riparian rights and appurtenances and all the estate and rights of the mortgagor in and to said premises.

Together With all fixtures and articles of personal [fol. 55] property, now or hereafter attached to, and used in connection with, the above described premises, all of which are covered by said mortgage.

Burke I. Burke, Erie County Judge.

Granted June 9, 1959.

O. E. Mueller, Special Deputy Clerk.

IN THE COUNTY COURT OF ERIE COUNTY

DECISION

A motion having been made herein by the plaintiff for summary judgment in favor of the plaintiff and against the defendant, United States of America, under Rule 113 of the Rules of Civil Practice, and for an Order striking out the answer interposed herein by the defendant, United States of America, on the ground that the answer has no merit and there is no defense to the cause of action set forth in the complaint of the plaintiff, and on the return day of said motion, to wit: the 12th day of March, 1959, at a Special Term of this Court, the Court having read the complaint and the answer of the defendant, United States of America, and the general answer of Evan E. James, Esq., Guardian *ad Litem* for the defendant, Marilyn M. Victory, an infant, submitting the rights of said infant to the Court, and the general answer of Evan E. James, Esq., [fol. 56] Designated Attorney for the defendant, Duane B. Victory, a member of the Armed Forces of the United States of America, submitting his rights to the Court, and having read and filed the notice of motion herein dated March 2, 1959, with proof of due service thereof, the affidavit of Evar J. Skoog, verified March 2, 1959, and the answering document of the defendant, United States of America, designated by it, "Answer to Plaintiff's Petition and Motion", and after hearing Little and Burt, John H. Little of counsel, attorneys for the plaintiff, in support of the motion, and John O. Henderson, United States Attorney, William I. Schapiro of counsel, attorney for the defendant, United States of America, in opposition thereto, and Evan E. James, Esq., Special Guardian and Designated Attorney appearing but not opposing plaintiff's motion and Messrs. Moot, Sprague, Marcy and Gulick, William H. Gage and Thomas G. Richert of counsel, attorneys for Erie County Savings Bank appearing *Amicus Curiae*, and the Court having taken proof at that time of the facts and circumstances stated in plaintiff's complaint and the plaintiff having produced proof by witnesses of the allegations contained in its complaint and none of the defendants having offered any proof in opposition thereto,

and it appearing that the summons and complaint and the *lis pendens* in this action were duly filed in the Erie County Clerk's Office on the 21st day of October, 1958, and that all of the defendants herein have been personally served with a copy of the summons and complaint within the [fol. 57] State of New York more than twenty days since, except the defendant, Duane B. Victory, a member of the Armed Forces of the United States of America, residing in the City of Springfield, Massachusetts, who was duly served more than thirty days since, and the defendant, United States of America, which was duly served more than sixty days since. That none of the defendants have appeared herein except the defendant, B. & L. Motors Inc., which has duly appeared herein by its attorney, Anthony C. Hardo, Esq.; the defendant, David Cole, doing business under the name of Dave Cole Motors, as successor in interest to David Cole and Edward Cole, doing business as Dave Cole Motors, who has duly appeared herein by his attorneys, Messrs. Cohen, Lombardo, Maisel, Blewett and Fisher; the defendant, The Gramatan National Bank and Trust Company of Bronxville, which has duly appeared herein by its attorney, David J. Goldstein, Esq.; the defendant, Agnes B. Thuman, who has duly appeared herein by her attorney, Francis J. Busteed, Esq.; the defendant, Manufacturers and Traders Trust Company, which has duly appeared herein by its attorneys, Messrs. Hodgson, Russ, Andrews, Woods & Goodyear; and the defendant, The People of the State of New York, which has duly appeared herein by its attorney, Hon. Louis J. Lefkowitz, Attorney General. That all of said defendants have waived notice of all proceedings herein except notice of sale and notice of surplus money proceedings, except the defendant, [fol. 58] The People of the State of New York, which has waived service of all papers herein, except amended complaint, notice of sale, referee's report of sale, notice of motion to confirm referee's report of sale, judgment or order thereon, surplus money proceedings, and notice of application to discontinue action, and that all of said defendants have made default in pleading except the defendant, United States of America, as aforesaid, and the defendant, Marilyn M. Victory, an infant, who has appeared and interposed a general answer by her attorney, Evan E. James, Esq.; and the defendant, Duane B.

Victory, a member of the Armed Forces of the United States of America, who has appeared and interposed a general answer by his attorney, Evan E. James, Esq.; and due deliberation having been had thereon, I find as follows:

FINDINGS OF FACT

I. That the plaintiff and the defendants, The Western Savings Bank of Buffalo, B. & L. Motors Inc., The Gramatan National Bank and Trust Company of Bronxville, and Manufacturers and Traders Trust Company, are and at all times hereinafter mentioned were domestic corporations.

II. That one Joseph B. Victory, for the purpose of securing payment to plaintiff, Buffalo Savings Bank, of Two Thousand Six Hundred Dollars ($2,600.00), with interest thereon, on or about the 5th day of April, 1946, duly executed and delivered to said plaintiff, Buffalo Savings Bank, [fol. 59] his bond dated that day whereby he promised to pay to plaintiff, Buffalo Savings Bank, or its assigns, the principal sum of Two Thousand Six Hundred Dollars ($2,600.00) in manner following:

> "Twenty-five Dollars ($25.00) on the 10th day of October, 1946, and Twenty-five Dollars ($25.00) quarter-annually thereafter until the 10th day of July, 1949, when the balance of said principal sum then unpaid shall be due and payable, together with interest to be computed at the rate of five per centum (5%) per annum from the date hereof, and paid quarterly on the 10th days of January, April, July and October in each year, on all sums from time to time remaining unpaid, then this obligation to be void, otherwise to remain in full force and virtue."

III. That said bond also contained a further provision that the whole of said principal sum, or any part thereof, should at the option of the obligee become due and payable upon the happening of any of the events specified in a certain mortgage bearing even date therewith given to secure said bond and that all the covenants and agreement made by said obligor in said mortgage covering the premises therein described and collateral to said bond were made a part of said bond.

IV. That as collateral security for payment of said indebtedness, said Joseph B. Victory on the same day duly executed and delivered to the plaintiff a mortgage dated [fol. 60] that day whereby he mortgaged to said Buffalo Savings Bank, its successors and assigns, the following described premises:

> All That Tract or Parcel of Land situate in the City of Buffalo, County of Erie and State of New York, bounded and described as follows:
>
> Commencing at a point in the northerly line of Lyth Place, three hundred forty-three and two-tenths (343.2) feet westerly from its intersection with the westerly line of Jefferson Street; running thence westerly along said line of Lyth Place twenty-four and four-tenths (24.4) feet; thence northerly at right angles one hundred twenty (120) feet to a point midway between the northerly line of Lyth Place and the south line of Northland Avenue, formerly Puffer Street; thence easterly along the line midway between said lines of Lyth Place and Northland Avenue, formerly Puffer Street, twenty-four and four-tenths (24.4) feet; thence southerly at right angles one hundred twenty (120) feet to the northerly line of Lyth Place at the place of beginning.

V. That the said mortgage contained the same conditions as the said bond and the further condition that in case of default in the payment of said sum of money, or any part thereof, or the interest that might grow due thereon, the said mortgagee, the plaintiff Buffalo Savings Bank, was empowered to sell the mortgaged premises according to law.

[fol. 61] VI. That the said mortgage was duly recorded in the office of the Clerk of the County of Erie on the 5th day of April, 1946, at 2:35 o'clock P. M., in Liber 3626 of Mortgages at page 139. That the mortgage recording tax imposed thereon by law was duly paid.

VII. That the said mortgage contained the following covenants:

> "Second. • • • In event of foreclosure of this mortgage or other transfer of title to the mortgaged prop-

erty in extinguishment of the debt secured hereby, all right, title, and interest of the Mortgagor in and to any insurance policies then in force shall pass to the purchaser or grantee.

"Fifth. That the mortgagor will pay all taxes, assessments, water rates and other governmental or municipal charges, fines or impositions, and in default thereof the mortgagee may pay the same.

"Sixth. That the whole of said principal sum shall become due immediately after default in the payment of any installment of principal or of interest or after default in the payment of any tax, water rate or assessment for thirty days after notice and demand.

"Ninth. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver without notice, as a matter of right, [fol. 62] without consideration of the value of the premises as security for the amounts due the mortgagee, or the solvency of any person or persons liable for the payment of such amounts.

"Eleventh. That in the event of any default on the part of the Mortgagor hereunder, while said Mortgagor occupies said premises, the Mortgagor agrees to pay the Mortgagee on demand, as a reasonable monthly rental for the premises, an amount at least equivalent to one-twelfth of the aggregate of the installments of interest payable in the then current year, plus the actual amount of the annual taxes, assessments, water rates and insurance premiums for such year and, upon default on the payment of any sum due as such rental, the Mortgagee shall have the right to institute summary proceedings to obtain possession of said premises in the manner provided by Article 83 of the Civil Practice Act for the recovery of demised premises after a default in the payment of rent.

"Fifteenth. That in any action to foreclose this mortgage said premises may be sold in one parcel."

VII. That thereafter and on or about the 13th day of February, 1954, said Joseph B. Victory (also known as Joseph Victory) died, intestate, at the City of Buffalo, New York, a resident of Erie County, New York, leaving him surviving as his only distributees the defendant, Bev- [fol. 63] erly Victory, his widow, of full age, Marilyn M. Victory, a daughter, at that date an infant twelve (12) years of age, and Duane B. Victory, a son, at that date an infant nineteen (19) years of age. That thereafter and on or about the 12th day of September, 1956, Letters of Administration upon the estate of said decedent were issued by the Surrogate of Erie County to the defendant, Beverly Victory, who is still acting as such Administratrix.

That no estate or transfer tax proceedings upon the estate of said decedent are on file in the office of said Surrogate of Erie County.

IX. That the defendant, Marilyn M. Victory, is now an infant over the age of fourteen (14) years and resides at No. 30 Lyth Avenue in the City of Buffalo, New York, with her mother, the defendant, Beverly Victory, who is the person having the care and charge of said infant. That the defendant, Duane B. Victory, is now an adult but is a member of the Armed Forces of the United States of America.

X. That the said defendants and each of them have failed to comply with the conditions of said bond and mortgage in that they have failed to pay the 1958 Erie County tax levied by said County against the premises covered by said mortgage and the 1957 and 1958 City taxes levied by the City of Buffalo against the premises covered by said mortgage and the 1958 City of Buffalo Sewer rent levied by the Buffalo Sewer Authority against the premises covered by [fol. 64] said mortgage. That more than thirty days have elapsed since due demand has been made for the payment of said taxes and sewer rent and said taxes and sewer rent remain unpaid.

XI. That the said defendants, and each of them, have failed to comply with the conditions of said bond and mortgage in that they have failed to pay the principal and interest due and called for in said bond and mortgage, to wit: the installments of principal and interest due on

the 10th days of April, July and October, 1958, and on the 10th day of January, 1959.

XII. That in and by the terms of said bond and mortgage, the full amount thereof remaining unpaid, to wit: One Thousand Four Hundred Seventy-three and 75/100 Dollars ($1,473.75) is now due and payable because of the default by the defendants in paying said taxes and sewer rent and said installments of principal and interest and that plaintiff, Buffalo Savings Bank, has elected by reason thereof and under the terms and conditions set forth in said bond and mortgage that the whole of said principal sum remaining unpaid, secured by said bond and mortgage, together with the interest thereon, should immediately, as elected, be due and payable.

XIII. That there is due plaintiff on said bond and mortgage the principal sum of One Thousand Four Hundred Seventy-three and 75/100 Dollars ($1,473.75) with interest at the rate of five per centum (5%) per annum from the 10th day of January, 1958.

[fol. 65] XIV. That a recapitulation of the amount due plaintiff on said bond and mortgage is as follows:

Principal of bond and mortgage due and unpaid	$1,473.75
Interest thereon from January 10, 1958, to March 12, 1959, at the rate of five per centum (5%) per annum	86.38
Amount due plaintiff March 12, 1959	$1,560.13

XV. That the defendant, Marilyn M. Victory, an infant, has no defense to this action.

XVI. That the defendant, Duane B. Victory, a member of the Armed Forces of the United States of America, has no defense to this action.

XVII. That no other action or proceeding has been commenced, at law or otherwise, for the recovery of the sum secured by the said bond and mortgage.

XVIII. That the interests or liens, if any, of each of the defendants accrued, subsequently to the lien of plaintiff's mortgage, and that all such interests or liens, if any,

are subject and subordinate to the lien of plaintiff's mortgage.

XIX. That the defendant, The People of the State of New York, is made a party defendant herein because of the fact that the transfer tax, if any there be due, upon the Estate of Joseph B. Victory (also known as Joseph Victory), deceased, is unpaid and to the extent thereof constitutes a lien on the premises above described and for no other reason.

[fol. 66] XX. That the defendant, United States of America, is made a party defendant herein because said United States of America filed a notice of tax lien (No. 1592) against said Joseph B. Victory (also known as Joseph Victory) on January 15, 1953, in the office of the Clerk of Erie County, New York, for the sum of $857.07.

XXI. That the plaintiff, Buffalo Savings Bank, has advanced no money for the payment of outstanding real estate taxes or assessments, water meter charges, sewer rents or insurance premiums against the mortgaged premises.

XXII. That the defendant, Beverly Victory, as Administratrix of the Estate of Joseph B. Victory (also known as Joseph Victory), deceased, is liable to the plaintiff for the amount of any deficiency arising on the foreclosure sale herein.

XXIII. That the answer of the defendant, United States of America, raises no issue of fact.

Conclusions of Law

I. That the plaintiff's mortgage is a valid and subsisting lien upon the property described in the complaint for the amount hereinbefore found due to the plaintiff, and that the rights, interests, liens and claims of the respective defendants, if any, are subject and subordinate thereto.

II. That the plaintiff is entitled to an order striking out the answer of the defendant, United States of America, pursuant to the provisions of Section 113 of the Civil Practice Act.

[fol. 67] III. That the plaintiff is entitled to judgment of foreclosure and sale of said property, free and clear of all rights, interests, liens and claims of the defendants and each of them, adjudging to the plaintiff the sum of One Thousand Five Hundred Sixty and 13/100 Dollars ($1,

560.13), with interest thereon from the 12th day of March, 1959, and directing the payment thereof and the costs and expenses of this action and of such sale out of the proceeds of the sale, and containing other appropriate directions, terms and provisions, with provision for a deficiency judgment against the defendant, Beverly Victory, as Administratrix of the Estate of Joseph B. Victory (also known as Joseph Victory), deceased.

IV. That said judgment of foreclosure and sale shall contain a provision directing the referee to sell said premises subject to all taxes, assessments and water rates, which are or may become liens on the premises at the time of the sale, together with such interest or penalties which may have lawfully accrued thereon.

V. That the judgment also provide that the premises be sold in one parcel.

VI. That the plaintiff should be granted costs and disbursements in this action.

I order and direct that judgment be entered accordingly.

Dated: Buffalo, New York, June 9, 1959.

Burke I. Burke, Erie County Judge.

[fol. 68] In the County Court of Erie County

Little & Burt, John F. Little, Esq., of Counsel Attorneys for Plaintiff.

John O. Henderson, Esq., United States Attorney, William I. Shapiro, Esq., Asst. U. S. Atty. of Counsel, Attorney for Defendant, United States of America.

Evan E. James, Esq., Guardian *ad litem* for Defendant, Marilyn M. Victory, and designated attorney for Defendant Duane B. Victory.

Moot, Sprague, Marcy & Gulick, William H. Gage and Thomas G. Rickert, Esqs., of Counsel, Attorneys for Erie County Savings Bank, *Amicus Curiae*.

Opinion of Hon. Burke I. Burke, Dated May 29, 1959

This is a motion, in a foreclosure action, to strike out the answer of Defendant, United States of America, and for summary judgment of foreclosure and sale.

As Plaintiff requests a judgment of sale, subject only to local estate taxes, the more substantial question presented is whether the determination in United States vs. New Britain, 347 U. S. 81 (1954), with its resulting doctrine of circular priority, is applicable.

Under most state laws, including New York, real property taxes rank above pre-existing liens and mortgages. In the New Britain case the U. S. Supreme Court held that real property taxes, assessed after a federal tax is as- [fol. 69] sessed, are subordinate to the federal tax lien. Thus there arises a circular priority in which:

a. The earlier mortgage outranks the federal tax lien (federal and state tax law).

b. The federal tax lien outranks the later real property tax (federal law).

c. The later real property tax outranks the mortage (state law.)

The U. S. Attorney's brief affords the following example of the mechanics of circular priority:

"A Mortgagee forecloses. The liens, ranked in order of time from oldest to newest, are:

1. The mortgage being foreclosed	$5,000.
2. Federal tax lien	2,000.
3. County tax lien	1,000.

Assume that a sale is ordered free and clear of the liens, and a purchaser buys the property for $6,000. The result required by the New Britain case would be as follows: $5,000. is set aside for the mortgage. The remaining $1,000. of surplus money is paid on the federal tax lien, which has been foreclosed. The county lien is paid in full out of the amount set aside for the mortgage, so that the mortgage ultimately gets $4,000."

Plaintiff contends the rule does not apply here because of [fol. 70] the different type of sale permitted by Section 1087 of the New York Civil Practice Act. Defendant, United States of America, denies such contention.

The complaint alleges defaults in payment of principal and interest, and requests sale of the mortgaged premises to satisfy foreclosure costs and expenses and amounts alleged due and unpaid on the bond and mortgage. The complaint further alleges that Plaintiff may be required to pay real estate taxes and assessments affecting the premises and asks that if such sums are paid, they be included. The complaint further alleges that the United States of America is made a Defendant by reason of a tax lien filed against Joseph Victory on January 15, 1953 in the amount of $857.07.

The Defendant, United States of America, in its answer, denies knowledge or information coeerning the mortgage transaction; admits existence of its tax lien; denies said lien is subordinate to any other liens against the premises; and denies said lien is subordinate to any claim by Plaintiff for payment of real estate taxes and assessments that Plaintiff may choose to make.

The Defendant, United States of America, as an affirmative defense, alleges, (1) that there is an unpaid balance of $687.07 plus interest on its tax lien; (2) that the interest and liens of all Defendants are inferior to said tax lien; (3) that the judgment of foreclosure and sale, if [fol. 71] granted, require the referee to pay from the proceeds of sale, the amount of said tax lien prior to the payment of the lien of any other Defendant.

The present motion was noticed to strike the answer of Defendant, United States of America, to obtain summary judgment of foreclosure and sale, and to include in such judgment a direction that the premises be sold subject to local real property taxes and assessments. The moving papers include an affidavit by an officer of Plaintiff, stating Plaintiff had not advanced nor would advance any sums for payment of real estate taxes and assessments.

On the return date of the motion, Defendant United States of America, filed with the court and served on Plaintiff's attorneys an instrument entitled, "Answer to Plaintiff's petition and motion." Therein Defendant, United States of America, re-alleges a balance of $687.07 due on its tax lien and that said lien is superior to all local tax liens; alleges that paragraph seven of its answer controverts the relief sought by Plaintiff and that the motion therefore should be denied.

In the event judgment is granted, Defendant's answer alleges such judgment should direct a sale subject to the United States tax lien, if the judgment directs a sale subject to local tax liens; or that such judgment direct payment of the United States tax lien immediately after referee's expenses, legal costs and disbursements, principal [fol. 72] and interest due on Plaintiff's mortgage, amounts due on other liens choate prior to the United States tax lien, if such judgment directs a sale free and clear of local tax liens."

On the return date of the motion, Plaintiff, without objection by Defendant, United States of America, submitted proof as to the existence and extent of the mortgage lien for principal and interest, and that it had not advanced nor would advance any sums for real estate taxes or assessments affecting the premises.

Erie County Savings Bank requested and was granted permission to appear and file a brief as *amicus curiae*.

Defendant, United States of America, apparently does not seriously oppose the motion for summary judgment. It does maintain that a sale of premises subject to unpaid local taxes should be a sale subject also to the government's tax lien or, in the alternative, that if the property is sold free and clear of all liens and encumbrances, the federal government's priority be recognized.

With respect to the motion for summary judgment, the court is of the opinion that, by reason of the evidence submitted on the return date of the motion, the complaint and answer now raise no issue of fact and that the effect of the answer is to allege (1) priority of the lien of defendant, United States of America, and (2) that the order sought by Plaintiff is contrary to law.

[fol. 73] Conclusions of law are insufficient to withstand a motion for summary judgment and the court has power to act, as it did in Aquilino v United States, 3 New York 2nd, 511, where the facts were admitted and the only issue presented, the relative priority of the United States Government and other lien holders. The priority of liens and whether the sale is to be made subject to any local taxes and assessments are matters for the court to determine on application for judgment. Accordingly Plaintiff's motion

for summary judgment is granted, there remaining the form of the order directing sale of the mortgaged premises.

Section 1087 of the New York Civil Practice Act, referring to real property foreclosure procedures, reads:

> 1087: "Where a judgment rendered in an action to foreclose a mortgage upon real property directs a sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale within the meaning of that expression as used in any provision of this article. The provisions of this sec- [fol. 74] tion shall not apply to any judgment in an action wherein any municipal corporation of this state is the plaintiff and the purchaser at the foreclosure sale thereunder."

Under this section it is within the discretion of the court to direct the referee to pay real property taxes from the proceeds of sale, or to direct the property be sold subject to such taxes.

The New Britain case does not mandate a sale directing payment of taxes by the referee. As Plaintiff notes in its brief, the United States prefers this procedure so that the referee may be required to bring the proceeds of sale into court, and then directed to distribute them in accordance with the priority established in the New Britain case.

In its answer to the complaint, Defendant, United States of America, prays that the referee be required to pay from the proceeds of sale the tax lien of the United States. But in its answer to the application for summary judgment, Defendant, United States of America, asks a sale in one of two ways: (1) free and clear of all liens, with the federal lien paid pursuant to the New Britain rule, (2) subject to local real estate taxes, if also subject to federal tax liens.

As to the latter proposition advanced by Defendant, United States of America, it has been brought to the court's

attention that the only appearances in the New Britain [fol. 75] case were on behalf of the United States and the City of New Britain; that the mortgagee was not represented; that the decision was a determination of tax priorities without an opportunity for argument upon the extensive legal and social ramifications affecting mortgagors and mortgagees; and that the Connecticut decision reversed was one directing distribution of the proceeds of sale.

The New Britain case did not specifically involve the issue presented here, whether the court in its discretion may direct that the judgment contain a provision for sale by the referee subject to local taxes and assessments, as set forth in Section 1087 of the New York Civil Practice Act. And this court is unwilling to expand the effect of said decision.

Accordingly, it is directed that the clerk enter judgment for the relief demanded in the complaint, and that said judgment provide for sale by the referee, subject to unpaid local taxes and assessments. Submit order.

Dated: Buffalo, New York, May 29, 1959.

Burke I. Burke, Erie County Judge.

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* * * * * * *

[fol. 76] In the County Court of Erie County

Complaint

The plaintiff alleges on information and belief:

First: That the plaintiff, Buffalo Savings Bank; is a domestic banking corporation having its principal place of business at No. 545 Main Street in the City of Buffalo, New York.

That the defendant, The Western Savings Bank of Buffalo, is a domestic banking corporation having its principal place of business in the City of Buffalo, New York.

[fol. 77] That the defendant, B. & L. Motors Inc., is a domestic corporation having its principal place of business in the City of Buffalo, New York.

That the defendant, The Gramatan National Bank and

Trust Company of Bronxville, is a domestic banking corporation having its principal place of business in the Village of Bronxville, New York.

That the defendant, Manufacturers and Traders Trust Company, is a domestic banking corporation having its principal place of business in the City of Buffalo, New York.

Second: That heretofore, and on or about the 5th day of April, 1946, one Joseph B. Victory, since deceased, executed under his hand and seal, and delivered to the plaintiff, a bond bearing date on that day with a condition thereunder written, in substance, that the obligor in said bond named, his distributees, executors or administrators, should pay or cause to be paid to the obligee in said bond named, its certain attorney, successors or assigns, the sum of Twenty-Six Hundred Dollars ($2600.00) in manner following:

> "Twenty-five Dollars ($25.00) on the 10th day of October, 1946, and Twenty-five Dollars ($25.00) quarterannually thereafter until the 10th day of July, 1949, when the balance of said principal sum then unpaid shall be due and payable, together with interest to be computed at the rate of five per centum (5%) per [fol. 78] annum from the date hereof, and paid quarterly on the 10th days of January, April, July and October in each year, on all sums from time to time remaining unpaid, then this obligation to be void, otherwise to remain in full force and virtue."

That the said bond contained the further provision that the whole of said principal sum, or any part thereof, should forthwith or thereafter at the option of said obligee become due and payable upon the happening of any of the events specified in a certain mortgage bearing even date therewith, given to secure said bond, and that all the covenants, agreements, terms and conditions of said mortgage were thereby made a pa of said bond or obligation with the sam force and effect as if therein set forth at length.

Third: That the said Joseph B. Victory, since deceased, to secure the payment of the principal and interest mentioned in said bond, did, at the same time, execute under his hand and seal, and deliver to said plaintiff, a mortgage bearing even date with the bond, whereby he granted, released and conveyed unto said plaintiff, in fee, certain

lands and real estate, situate in the City of Buffalo, County of Erie and State of New York, which premises were described in said mortgage as follows:

All That Tract or Parcel of Land situate in the City of Buffalo, County of Erie and State of New York, bounded and described as follows:

Commencing at a point in the northerly line of Lyth [fol. 79] Place three hundred forty-three and two-tenths (343.2) feet westerly from its intersection with the westerly line of Jefferson Street; running thence westerly along said line of Lyth Place twenty-four and four-tenths (24.4) feet; thence northerly at right angles one hundred twenty (120) feet to a point midway between the northerly line of Lyth Place and the south line of Northland Avenue, formerly Puffer Street; thence easterly along the line midway between said lines of Lyth Place and Northland Avenue, formerly Puffer Street, twenty-four and four-tenths (24.4) feet; thence southerly at right angles one hundred twenty (120) feet to the northerly line of Lyth Place at the place of beginning.

Subject to restrictions and rights of utilities of record affecting said premises.

Together With all the right, title and interest of the mortgagor of, in and to the land lying in the bed of any street, road, avenue, lane or right of way as they now exist or formerly existed in, in front of or adjoining the said premises, and in and to all easements, riparian rights and appurtenances and all the estate and rights of the mortgagor in and to said premises.

Together With all fixtures and articles of personal property now or hereafter attached to, and used in connection with, the above described premises, all of which are covered by said mortgage.

[fol. 80] Fourth: That the said mortgage contained the same conditions as the said bond and in case of default in the payment of the said sum of money, or of any part thereof, or the interest that might grow due thereon, or in the payment of taxes or assessments, the said plaintiff

was thereby empowered to sell the said mortgaged premises according to law.

Fifth: That the said mortgage contained the following clauses, to wit:

"Second. * * * In event of foreclosure of this mortgage or other transfer of title to the mortgaged property in extinguishment of the debt secured hereby, all right, title, and interest of the Mortgagor in and to any insurance policies then in force shall pass to the purchaser or grantee.

"Fifth. That the mortgagor will pay all taxes, assessments, water rates and other governmental or municipal charges, fines or impositions, and in default thereof the mortgagee may pay the same.

"Sixth. That the whole of said principal sum shall become due immediately after default in the payment of any installment of principal or of interest or after default in the payment of any tax, water rate or assessment for thirty days after notice and demand.

"Ninth. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver, without notice, as a matter of right, [fol. 81] without consideration of the value of the premises as security for the amounts due the mortgagee, or the solvency of any person or persons liable for the payment of such amounts.

"Eleventh. That in the event of any default on the part of the Mortgagor hereunder, while said Mortgagor occupies said premises, the Mortgagor agrees to pay the Mortgagee on demand, as a reasonable monthly rental for the premises, an amount at least equivalent to one-twelfth of the aggregate of the installments of interest payable in the then current year, plus the actual amount of the annual taxes, assessments, water rates and insurance premiums for such year and, upon default in the payment of any sum due as such rental, the Mortgagee shall have the right to institute summary proceedings to obtain possession of said premises in the manner provided by Article 83 of the Civil Practice Act for the re-

covery of demised premises after a default in the payment of rent.

"Fifteenth. That in any action to foreclose this mortgage said premises may be sold in one parcel."

Sixth: That the said mortgage was duly recorded in the office of the Clerk of the County of Erie on the 5th day of April, 1946, at 2:35 o'clock, P. M., in Liber 3626 of Mortgages at page 139.

[fol. 82] Seventh: That thereafter and on or about the 13th day of February, 1954, said Joseph B. Victory (also known as Joseph Victory) died, intestate, at the City of Buffalo, New York, a resident of Erie County, New York, leaving him surviving as his only distributees the following named defendants, to wit: his widow, Beverly Victory, of full age, Marilyn M. Victory, a daughter at that date an infant twelve (12) years of age, and Duane B. Victory, a son, at that date an infant nineteen (19) years of age. That thereafter and on or about the 12th day of September, 1956, Letters of Administration upon the estate of said decedent were issued by the Surrogate of said Erie County to the defendant Beverly Victory who is still acting as such Adminstratrix.

That no estate or transfer tax proceedings upon the estate of said decedent are on file in the office of said Surrogate of Erie County.

Eighth: That the defendant, Marilyn M. Victory, is an infant over the age of fourteen (14) years and resides at Number 30 Lyth Avenue in the City of Buffalo, New York, with her mother, the defendant, Beverly Victory, she being the person having the care and charge of said infant.

Ninth: That on or about the 1st day of January, 1958, there became due to the County of Erie certain taxes levied by said County against the premises covered by said mortgage, and that on or about the 1st days of July, 1957 and 1958, there became due to the City of Buffalo certain taxes levied by said City against the premises [fol. 83] covered by said mortgage, and that on or about the 1st day of July, 1958, there became due to the City of Buffalo certain sewer rents levied by the Buffalo Sewer Authority against the premises covered by

said mortgage. That more than thirty days have elapsed since due demand has been made for the payment of said taxes and sewer rents and said taxes and sewer rents remain unpaid.

Tenth: That by reason thereof and in and by the terms of plaintiff's said bond and mortgage, the full amount thereof, remaining unpaid, to wit: One Thousand Four Hundred Seventy-three and 75/100 Dollars ($1,473.75) is now due and payable, and that the plaintiff has elected and does hereby elect that the whole of the said principal sum secured by the said bond and mortgage, remaining unpaid, together with the interest thereon, shall immediately be and became due and payable.

Eleventh: That in and by the terms of said bond and mortgage, the full amount thereof, remaining unpaid, to wit: One Thousand Four Hundred Seventy-three and 75/100 Dollars ($1,473.75) is now due and payable, the defendants having failed and neglected to pay the installments of interest and principal due thereon, on the 10th days of April, July and October, 1958, and that the plaintiff has elected and does hereby elect, by reason thereof, and under the terms and conditions set forth in said bond and mortgage, that the whole of the principal sum secured by [fol. 84] the said bond and mortgage, remaining unpaid together with the interest thereon, shall immediately be and become due and payable.

Twelfth: That by reason thereof and in and by the terms of plaintiff's said bond and mortgage, the full amount thereof, remaining unpaid, to wit: One Thousand Four Hundred Seventy-three and 75/100 Dollars ($1,473.75) is now due and payable, and that the plaintiff has elected and does hereby elect that the whole of the said principal sum secured by the said bond and mortgage, remaining unpaid, together with the interest thereon, shall immediately be and become due and payable.

Thirteenth: That the plaintiff is now the sole, true and lawful owner and holder of said bond and mortgage. That of the moneys secured to be paid by said bond and mortgage there is now due and remaining unpaid the sum of One Thousand Four Hundred Seventy-three and 75/100 Dollars ($1,473.75) with interest thereon at the rate of

Five per centum (5%) per annum from the 10th day of January, 1958, and that no action has ever been brought, instituted or taken to recover the moneys so, as aforesaid, due and unpaid on the said bond and mortgage or any part thereof.

Fourteenth: That The People of the State of New York is made a party defendant herein because of the fact that the transfer tax, if any there be due, upon the Estate of Joseph B. Victory (also know as Joseph Victory),—de- [fol. 85] ceased, is unpaid and to the extent thereof constitutes a lien on the premises above described and for no other reason.

Fifteenth: That the United States of America is named as a party defendant herein because said United States of America filed a notice of tax lien (No. 1592) against said Joseph B. Victory (also know as Joseph Victory) on January 15, 1953, in the office of the Clerk of Erie County, New York, for the sum of $857.07.

Sixteenth: That in order to protect its security the plaintiff may be compelled during the pendency of this action to pay taxes, assessments, water rates, water meter charges, sewer rents and insurance premiums, if any there be, and other charges affecting the premises, and the plaintiff requests that any sum so paid by it shall be added to the sum otherwise due and be deemed secured by the said mortgage and adjudged a valid lien on the premises herein described.

Seventeenth: That the defendants and each of them, have, claim to have, or may have, some interest in or lien upon the mortgaged premises, which said interests in or liens upon said mortgaged premises, if any, have accrued subsequently to the lien of the plaintiff's mortgage and or are inferior thereto.

Eighteenth: That the plaintiff demands judgment in this action establishing the amount due and unpaid on said bond and mortgage, together with any moneys advanced and paid pursuant to any term or provision of the bond and [fol. 86] mortgage set forth herein, or to protect the lien of said mortgage together with the taxes, sewer rents, water charges, insurance and all other charges and liens thereon to be paid, and that said mortgaged premises be sold to satisfy the same, and the costs and expenses of this

action, and of such sale, and that the defendants in this action, and all persons claiming, or to claim by, through or under them, or any of them, subsequent to the commencement of this action, be forever barred and foreclosed of and from all equity of redemption, right, title, lien, interest, claim and demand of, in and to the said mortgaged premises, and every part thereof, and if the amount arising from such sale be insufficient to pay the amount due and unpaid on said bond and mortgage and the costs and expenses of this action, and of such sale, that the defendant, Beverly Victory, as Administratrix of the Estate of Joseph B. Victory (also known as Joseph Victory), deceased, may be ajudged to pay the plaintiff the amount of such deficiency, and that the plaintiff may have such other or further relief, or both, in the premises as this Court shall deem just and proper.

Little and Burt, Attorneys for Plaintiff.

(Verified by Ray F. Eisenhardt, Vice President, on October 21st, 1958.)

[fol. 87] In the County Court of Erie County

Answer of United States of America

The defendant United States of America by John O. Henderson, United States Attorney in and for the Western District of New York, for its answer to the complaint herein:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "First" through "Fourteenth", both inclusive of the plaintiff's complaint.

2. Admits the allegations contained in paragraph "Fifteenth" of the plaintiff's complaint.

3. Denies the allegations contained in paragraphs "Sixteenth" and "Eighteenth" of the plaintiff's complaint.

4. As to the allegations contained in paragraph "Seventeenth" of the plaintiff complaint, admits that the United States has a lien upon the mortgaged premises; denies

that the lien of the United States is subordinate to any lien asserted by the plaintiff on account of the plaintiff's payment of taxes, assessments, water rights, water meter charges, sewer rents, insurance premiums and other charges affecting the premises; and denies knowledge or information sufficient to form a belief as to the remaining allegations of that paragraph.

For a Separate and Affirmative Defense, Defendant Alleges:

5. The defendant United States of America has outstand-[fol. 88] ing against the premises sought to be foreclosed tax lien Number 6-4275 in the amount of $857.07 filed in the office of the Clerk of Erie County at Buffalo, New York, on January 19, 1953, of which $689.07 plus interest remains unpaid and is due the United States.

6. Upon information and belief the interest in and liens upon the mortgaged premises, if any, of all other defendants are inferior to the aforesaid tax lien of the United States.

7. All unpaid taxes, assessments, water rights, water meter charges, sewer rents, insurance premiums and other charges affecting the premises (hereinafter collectively referred to as "unpaid taxes and other charges") and all liens for the same, if any, are inferior to the aforesaid tax lien of the United States.

8. The lien, if any, asserted by the plaintiff on account of the plaintiff's payment of unpaid taxes and other charges is inferior to the aforesaid tax lien of United States.

9. Plaintiff, in its complaint, demands that the aforesaid unpaid taxes and other charges, and any and all liens for the same, and any lien asserted by plaintiff on account of the plaintiff's payment of the same, be satisfied and paid out of the proceeds of the foreclosure sale prior to any payment to the United States, notwithstanding that the said unpaid taxes and other charges, and any and all liens for the same, and any lien asserted by plaintiff on account of the plaintiff's payment of the same are inferior to the aforesaid tax lien of the United States.

[fol. 89] Wherefore the defendant United States of America prays that:

(1) The judgment of foreclosure and sale expressly requires the referee to pay out of the proceeds of sale the said tax lien of the United States plus interest prior to payment of the said unpaid taxes and other charges, or any and all liens for the same, or any lien asserted by the plaintiff on account of its payment of the same.

(2) The referee pay out of the proceeds of sale the said tax lien of the United States plus interest prior to the payment of the lien of any other defendant in this proceeding.

Dated, Buffalo, New York, January 5, 1959.

John O. Henderson, United States Attorney in and for the Western District of New York, Attorney for Defendant United States of America.

[fol. 92] IN THE COUNTY COURT OF ERIE COUNTY

NOTICE OF MOTION TO STRIKE ANSWER AND FOR JUDGMENT—Dated March 2, 1959

Sirs:

Please Take Notice that on the pleadings herein on the annexed affidavit of Evar J. Skoog, verified March 2nd, 1959, and on all the proceedings had herein, the undersigned will move this Court, pursuant to Rule 113 of the Rules of Civil Practice, at a Special Term, Part I thereof, to be held in and for the County of Erie, at the Erie County Hall in the City of Buffalo, New York, on the 12th day of March, 1959, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order striking out the answer of the defendant, United States of America, and directing that this action shall proceed in the usual manner to judgment of foreclosure and sale, which said judgment shall provide that the premises shall be sold free and clear of the tax lien filed by the United States of America but subject to all real property taxes and assessments, and for such other and further relief as to the Court may seem just and proper.

Please Take Further Notice that answering affidavits

to be read on this motion must be served at least five (5) days before the return day hereof.

Dated: Buffalo, New York, March 2nd, 1959.

Yours, etc., Little and Burt, Attorneys for Plaintiff.

[fol. 93] To: Hon. John O. Henderson, Attorney for Defendant, United States of America. Evan E. James, Esq., Guardian ad Litem for the Defendant Marilyn M. Victory, and Designated Attorney for the Defendant, Duane B. Victory.

AFFIDAVIT OF EVAN J. SKOSS IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

EVAN J. SKOSS, being duly sworn, deposes and says that he is a Vice-President of the plaintiff, Buffalo Savings Bank, and is in charge of all mortgage loans made by said plaintiff, Buffalo Savings Bank. That deponent has personal knowledge of all of the facts hereinafter stated.

That this is an action to obtain the foreclosure of a mortgage given by Joseph B. Victory, since deceased, to the plaintiff, Buffalo Savings Bank, in the sum of Twenty-six Hundred Dollars ($2600.00), dated April 5, 1946, and recorded in the Erie County Clerk's Office on the 5th day [fol. 94] of April, 1946, in Liber 3626 of Mortgages at page 139. The *lis pendens* in this action was filed in the Erie County Clerk's Office on October 21, 1958. All of the defendants have been personally served with a copy of the summons and complaint more than twenty days since, except the defendant, Duane B. Victory, a member of the Armed Forces of the United States of America, residing in the City of Springfield, Massachusetts, who was served more than thirty days since, and the defendant United States of America, which has been served with a copy of the summons and complaint more than sixty days since. The defendant, Marilyn M. Victory, has interposed an answer by her Guardian *ad Litem*, Evan E. James Esq. in the usual form for Guardians *ad Litem* submitting the rights of said infant to the Court for such relief as may be just and equitable in the premises; the defendant, Duane

B. Victory, a member of the Armed Forces of the United States of America, has interposed an answer in the same form by his Designated Attorney, Evan E. James, Esq.; and the defendant, United States of America, has interposed an answer. No other defendant has answered.

That the complaint in this action alleges that the unpaid balance of plaintiff's mortgage in the sum of One Thousand Four Hundred Seventy-three and 75 100 Dollars ($1,473.75), with interest at the rate of five per centum (5%) per annum from the 10th day of January, 1958, [fol. 95] is now due and payable because the defendants have failed to pay the installments of interest and principal due on said mortgage pursuant to its terms on the 10th days of April, July, and October, 1958, and because the 1958 County tax, the 1957 and 1958 City taxes, and the 1958 Sewer rent on the mortgaged premises remain unpaid. Said complaint asks for judgment of foreclosure and sale in the usual form.

That the answer of the defendant, United States of America, does not controvert any of the foregoing allegations of plaintiff's complaint. Said answer merely states that the United States of America has a lien on the mortgaged premises by reason of having filed in the Erie County Clerk's Office on January 15, 1953, a tax lien in the sum of Eight Hundred Fifty-seven and 7 100 Dollars ($857.07) against said Joseph B. Victory, the mortgagor and then owner of the mortgaged premises, which lien it claims is superior to any lien asserted by the plaintiff on account of the plaintiff's payment of taxes, assessments, water rates, water rights, water meter charges, sewer rents, insurance premiums and other charges affecting the premises or any lien which the plaintiff may assert for amounts advanced for the payment of said items after the institution of this foreclosure action. Said answer does not claim said tax lien is superior to the principal and interest due on plaintiff's mortgage.

The defendant, United States of America, prays for relief:

[fol. 96] (1) The judgment of foreclosure and sale expressly requires the referee to pay out of the proceeds of sale the said tax lien of the United States plus interest prior to payment of the said unpaid taxes

and other charges, or any and all liens for the same, or any lien asserted by the plaintiff on account of its payment of the same.

(2) The referee pay out of the proceeds of sale the said tax lien of the United States plus interest prior to the payment of the lien of any other defendant in this proceeding.

The plaintiff has not advanced any sums for taxes, assessments, water rates, water rights, water meter charges, sewer rents, insurance premiums and other charges affecting the premises and does not claim a lien on the mortgaged premises for any such amount so advanced. The plaintiff has no intention of advancing any moneys for said taxes, assessments, water rates, water rights, water meter charges, sewer rents, insurance premiums and other charges affecting the premises between now and the entry of judgment of foreclosure and sale in this matter. Plaintiff asks only for judgment of foreclosure and sale for the amount of the unpaid principal and interest due on the mortgage, plus the costs and disbursements of this action. There is, therefore, no controversy between the plaintiff and the defendant, United States of America, and said answer of the defendant, United States of America, raises no issues.

[fol. 97] That the deponent does not believe there is any merit to the answer of the defendant, United States of America.

Plaintiff's application for an order striking out the answer of the defendant, United States of America, and directing that this action should proceed in the usual fashion to a judgment of foreclosure and sale, which said judgment shall provide that the premises shall be sold subject to all real estate taxes, should be granted.

s/ Evar J. Skoog.

(Sworn to by Evar J. Skoog on March 2, 1959.)

IN THE COUNTY COURT OF ERIE COUNTY

COUNTER MOTION OF THE UNITED STATES DESIGNATED "ANSWER TO PLAINTIFF'S PETITION AND MOTION"

The defendant, United States of America, by John O. Henderson, United States Attorney in and for the Western District of New York, for its answer to the petition of the plaintiff sworn to on March 2, 1959, alleges:

I

1. The United States tax lien of $687.07 plus interest against the foreclosed premises is prior in time to the lien or liens against such premises for county tax, city tax, [fol. 98] water rates, sewer rents and assessments (hereinafter collectively referred to as "local tax liens").

2. Under applicable law the United States tax lien is superior to local tax liens. A very brief memorandum is attached citing authorities in support of this statement, (Memorandum omitted from record on appeal.)

3. Plaintiff seeks a judgment of foreclosure and sale which will foreclose and extinguish the United States tax lien, whether or not it is paid in full, and yet preserve the inferior local tax liens.

4. The relief sought by plainfiff

(a) is contrary to law

(b) is inconsistent with the superior status of the United States tax liens as against the local tax liens

(c) creates a controversy between the plaintiff and the United States, which controversy is raised by paragraph 7 of the answer of the United States.

II

5. The plaintiff alleged in paragraph Sixteenth of its complaint that it may be compelled to pay local taxes during the pendency of the action to protect its lien, and it [fol. 99] asked in paragraph Eighteenth of its complaint that any moneys so paid by it be added to the lien of the mortgage and be satisfied out of the proceeds of the foreclosure sale.

6. The plaintiff asked in paragraph Eighteenth of its

complaint that the expenses of the foreclosure sale be paid out of the proceeds of such sale. A demand for such relief in a mortgage foreclosure action means under Civil Practice Act 1087 that the plaintiff wants the local tax liens to be paid by the referee as expenses of the sale.

7. The answer of the United States precisely controverted the aforesaid contentions and requests in the plaintiff's complaint.

8. Now the plaintiff asserts, in the petition of its Vice-President Skoog, that it has not paid any local taxes to protect its lien and does not intend to; and that it desires the premises to be sold *subject to* local tax liens. Consequently the plaintiff now abandons some of the contentions and requests contained in its complaint and now seeks a different type of relief from that requested in its complaint.

9. Therefore, if we assume *arguendo* that the answer of the United States does not raise any controversy as to the relief most recently sought by the plaintiff, the reason for such a situation is that the United States has answered the [fol. 100] complaint, whereas the plaintiff now wants a judgment which it did not ask for in the complaint.

10. However, paragraph 7 of the answer of the United States does in fact controvert the relief now sought by the plaintiff.

Wherefore, the defendant, United States of America, respectfully prays:

1. That this court deny the instant motion of the plaintiff, af.

2. That if the plaintiff obtains a judgment of foreclosure and sale subject to local tax liens, that such sale also be subject to the United States tax lien. On the other hand, if the plaintiff obtains a judgment of foreclosure and sale free and clear of local tax liens, that the United States tax lien be paid behind a sum equal to only the following amounts: (1) The referee's expenses, (2) the legal costs and disbursements of Little and Burt in this proceeding, (3) the principal and interest due upon the plaintiff's mortgage and (4) the amount due on other liens, if any, which became elocate prior to the United States tax lien.

Or in the Alternative

3. That this court require the plaintiff to amend its complaint so as to state therein the relief which it desires and that this court require the United States to prepare [fol. 101] and serve an amended answer within a reasonable time after it is served with the amended complaint; and

4. That thereafter this court proceed to a determination of the issues raised in the amended complaint and amended answer.

Dated: Buffalo, New York, March 12, 1959.

John O. Henderson, United States Attorney in and for the Western District of New York; Attorney for Defendant, United States of America. By: /s/ William I. Schapiro, Assistant United States Attorney.

* * * * * * *

[fols. 101a-104] Additional Papers for the Court of Appeals

[fol. 105] IN THE COUNTY COURT—ERIE COUNTY, STATE OF NEW YORK

BUFFALO SAVINGS BANK, Plaintiff

vs.

BEVERLY VICTORY, Individually and as Administratrix of the Estate of JOSEPH B. VICTORY, also known as JOSEPH VICTORY, deceased; MARILYN M. VICTORY; DUANE B. VICTORY; THE WESTERN SAVINGS BANK OF BUFFALO; UNITED STATES OF AMERICA; B. & L. MOTORS, INC.; DAVID COLE, doing business under the name of DAVE COLE MOTORS, as successor in interest to DAVID COLE and EDWARD COLE, doing business as DAVE COLE MOTORS; THE GRAMATAN NATIONAL BANK AND TRUST COMPANY OF BRONXVILLE; AGNES B. THUMAN, as Executrix of the Last Will and Testament of SYLVESTER C. THUMAN, deceased; MANUFACTURERS AND TRADERS TRUST COMPANY; THE PEOPLE OF THE STATE OF NEW YORK; ALVIN JONES, Defendants.

NOTICE OF APPEAL TO COURT OF APPEALS—Dated June 14, 1961

Sirs:

Take Notice that the plaintiff hereby appeals to the Court of Appeals from the Judgment in the above entitled action entered and filed in the Office of the Clerk of the County of Erie on the 13th day of June, 1961, which judgment was entered upon the Order of the Appellate Division of the Supreme Court, Fourth Department, entered and filed in the Office of the Clerk of that Court on the 18th day [fol. 106] of May, 1961, which judgment modified on the law the resettled judgment of the County Court, Erie County, entered in the Office of the Clerk of the County of Erie on October 20, 1960; and

Take Further Notice that the plaintiff will bring up for review upon the appeal the Order of the Appellate Division of the Supreme Court, Fourth Department, entered in the Office of the Clerk of that Court on the 1st day of July, 1960, reversing the judgment of the County Court, Erie

County, entered in the Office of the Clerk of the County of Erie on the 9th day of June, 1959.

Dated: Buffalo, New York. June 14th, 1961.

Yours, etc., Little and Burt, Attorneys for Plaintiff-Appellant, Office and P. O. Address, Buffalo Savings Bank Bldg., 545 Main Street, Buffalo 3, New York.

To: Clerk of the County of Erie, Neil R. Farmelo, Esq. By C. Donald O'Connor, Assistant U. S. Attorney, Attorney for Defendant-Respondent, United States of America, Office and P. O. Address, 702 U. S. Courthouse, Buffalo 2, [fol: 107] New York. Evan E. James, Esq. Guardian ad Litem for the defendant Marilyn M. Victory, and Designated Attorney for the defendant, Duane B. Victory, Office and P. O. Address, Prudential Building, Buffalo 2, New York. Moot, Sprague, Marcy & Gulick. By William H. Gage, Attorneys for Erie County Savings Bank, Amicus Curiae, Office and P. O. Address, 400 Erie County Bank Building, Buffalo 2, New York.

[fol. 108] In the Supreme Court of New York
Appellate Division—Fourth Department

Buffalo Savings Bank, Respondent

vs.

Beverly Victory, Individually and as Administratrix of the Estate of Joseph Victory, deceased; Marilyn M. Victory; Duane B. Victory; The Western Savings Bank of Buffalo; B. & J. Motors Inc.; David Cole d/b/a Dave Cole Motors, as successor in interest to David Cole and Edward Cole, d/b/a Dave Cole Motors; The Gramatan National Bank and Trust Company of Bronxville; Agnes B. Thuman, as Executrix of the Last Will and Testament of Sylvester C. Thuman, deceased; Manufacturers and Traders Trust Company; The People of the State of New York; Alvin Jones, Defendants, United States of America, Appellant.

Appellate Division's Order of Modification—
Entered May 18, 1961

The above named United States of America one of the defendants in this action, having appealed to the Appellate [fol. 109] Division of the Supreme Court, Fourth Department, from a judgment of the Erie County Court, entered in the office of the Clerk of the County of Erie, on the 20th day of October, 1960, and the said appeal having been argued by Mr. C. Donald O'Connor of counsel for the appellant, and by Mr. John H. Little of counsel for the respondent, plaintiff, and submitted by Messrs. Moot, Sprague, Marcy and Gulick of counsel for Erie County Savings Bank, amicus curiae, and due deliberation having been had thereon.

It is hereby Ordered, That the judgment so appealed from be, and the same hereby, is unanimously modified on the law as follows:

1. The third ordering paragraph, striking out the answer of the defendant United States of Americ is stricken out.

2. The fourth ordering paragraph is modified by striking

therefrom the words "the plaintiff is entitled to have herein" and by substituting therefor the words "there is due on the mortgage," and by striking out the word "besides" and substituting the words "and the plaintiff is entitled to have herein";

3. The sixth ordering paragraph is stricken out and the following is substituted therefor:

"Ordered, Adjudged and Decreed that the mortgaged premises described in the complaint in this action as hereinafter set forth, be sold at public auction in the westerly [fol. 110] vestibule of the Erie County Hall, Buffalo, New York, by or under the direction of Robert W. McNulty of the Town of Orchard Park, in the County of Erie, New York, who is hereby appointed referee for that purpose; that said referee give public notice of the time and place of such sale, according to law and the course and practice of this Court; that the plaintiff or any other party to this action, may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed of the premises sold; and that said sale shall be made free and clear of all liens. It is further

"Ordered, Adjudged and Decreed that the purchaser or purchasers at such sale be let into possession on production of the referee's deed or deeds.

"That said referee forthwith, upon receipt of the proceeds of sale or any part thereof, deposit the same in his own name as referee, in the Liberty Bank of Buffalo, and that said referee, after the delivery of said deed, pay from the moneys so deposited the referee's legal fees, the allowance to the Special Guardian and Designated Attorney, and the lawful advertising expenses, and the plaintiff's costs and disbursements as heretofore adjudged, with interest from the date hereof.

"That out of the net proceeds of the sale then remaining, the referee shall set aside the sum found to be due upon the plaintiff's mortgage with interest thereon as aforesaid, [fol. 111] and also a sum sufficient to pay other outstanding liens, if any, which are superior to the tax lien of the United States by reason of their accrual prior to the time of filing of the United States lien, with interest, in a separate bank account in his name to be designated the "Priority

Adjustment Fund. In the event of any uncertainty or dispute as to the amounts or priorities of said liens, the referee shall apply to the County Court for directions, upon notice to all interested parties.

"From the balance remaining, if any, after the setting aside of the said sum, the said referee shall pay the tax lien of the United States, filed on January 15, 1953, with interest, or so much thereof as he is able to pay out of the said balance.

"From the balance remaining, if any, after such payment to the United States, the referee shall pay all local real estate taxes and assessments and water rates which are liens upon the property sold, and pay the cost of redeeming said property from any real estate taxes, assessments and water rates which had not apparently become absolute, the liens of all such taxes, assessments and water rates being inferior to the tax lien of the United States, having accrued subsequent to the time of the filing of the United States tax lien. If there are insufficient moneys available to pay such real estate taxes and assessments and water rates, the balance thereof remaining unpaid shall be paid out of the Priority Adjustment Fund above directed to be set aside.

[fol. 112] "If there be a surplus remaining after making the payments in accordance with the foregoing directions, the referee shall deposit the same, within five days after its ascertainment, with the Liberty Bank of Buffalo, to the credit of this action, but subject to the further order of the Court herein.

"The referee shall pay out of the Priority Adjustment Fund the amount owing to the plaintiff as heretofore adjudged, and thereafter the amount of each of the other liens for which the said sum was so set aside, in order of their priority, or so much thereof as the sum so set aside shall be sufficient to pay.

"That said referee shall made a report of such sale and file it with the Clerk of Erie County; and if the proceeds of such sale, distributed as herein directed, be not sufficient to pay the amount due to the plaintiff, with interest, in full, that said referee specify the amount of such deficiency in his report of sale and that the defendant Beverly Victory, as Administratrix of the Estate of Joseph B. Victory (also known as Joseph Victory), deceased, pay the same to the

plaintiff, and upon application, as required by law, that the plaintiff have judgment and execution therefor, or so much thereof as the Court may determine to be just and equitable.

"That in case the plaintiff becomes the purchaser of said mortgaged premises at said sale, or in the event that the rights of the purchaser at said sale and the terms of sale [fol. 113] under this judgment shall be assigned to or shall be acquired by the plaintiff and a valid assignment thereof be delivered to said referee, said referee shall not require the plaintiff to pay in cash the entire amount bid at said sale, but shall execute and deliver to the plaintiff a deed of the premises sold upon the payment to said referee of the amounts hereinbefore specified as taxed by the Clerk of this Court and adjudged to the plaintiff for costs and disbursements with interest thereon from the date hereof, the referee's fees, advertising expenses and the allowance to the Special Guardian and Designated Attorney, and the amount necessary to pay the aforesaid real estate taxes, assessments and water rates and interest and penalties thereon and the amount necessary to redeem the property sold from any sales for unpaid real estate taxes, assessments or water rates, and the amount which would become payable to the United States upon its tax lien under the directions hereinabove set forth, and the amount, if any, payable to other lienors whose liens were superior to that of the United States under the direction herein above set forth, or in lieu of the payment of said amounts, upon delivery to the referee of receipts showing the payment thereof. If, after allowing the plaintiff credit for the amount due upon its mortgage and interest and credit for the aforesaid payments, there shall remain of the amount so bid a surplus over and above the amounts so credited, the plaintiff shall pay to said referee upon delivery to it or its assigns of said referee's deed the amount of [fol. 114] such surplus and the referee shall deposit such sum in said depository as hereinbefore directed.

"That the said referee take the receipt of the plaintiff or its attorneys and of the other parties or persons to whom payments were made as hereinbefore directed, and file the same with his report of sale; that he deposit the surplus moneys, if any, with the Liberty Bank of Buffalo within five days after the same shall have been received by him

7

to the credit of this action to be withdrawn only on the order of this Court."

As so modified, the judgment appealed from is affirmed without costs.

Per Curiam, Opinion.

Enter.

Alger A. Williams,

Entered 18th day of May, 1961.

Herbert E. Wait, Clerk.

SUPREME COURT, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT,
CLERK'S OFFICE, ROCHESTER, N. Y.

I, Herbert E. Wait, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the following is a copy of an order made by said court upon the Appeal in the within entitled action or proceeding, and entered in this office on the 18th [fol. 115] day of May, 1961, and of the whole thereof.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court, at the City of Rochester, this 18th day of May, 1961.

Herbert E. Wait, Clerk.

(Seal.)

IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION—
FOURTH DEPARTMENT

APPELLATE DIVISION OPINION—May 18, 1961

Argued: February 16, 1961

Appeal from Judgment of Erie County Court, Burke, J., adjudging that the answer of the United States of America be stricken out, that the mortgage f premises be sold free and clear of local taxes, assessments and water rates, same to be paid out of the proceeds of the sale, the liens of the United

States of America having an earlier priority to be paid thereafter if sufficient funds remain.

Judgment entered October 20, 1960.

[fol. 116] APPEARANCES:

Little & Burt (John H. Little, of counsel), Attorneys for Plaintiff-Respondent. Neil R. Farmelo (C. Donald O'Connor, of counsel), Acting United States Attorney, Attorney for Appellant. Evan E. James, Guardian ad Litem, Defendants Victory. Moot, Sprague, Marcy & Gulick, Attorneys for Erie County Savings Bank, Amicus Curiae.

Per Curiam:

This case involves the question of the priority of a United States Government tax lien over liens for subsequently accrued local taxes in a mortgage foreclosure action. In our opinion, the rule of priorities laid down in United States v. City of New Britain, 347 U. S. 81, applies. The detailed terms of our order spell out our view of the proper application of that rule to the facts and relative priorities here present.

County Court, in the order appealed from, has endeavored to invoke what that court has construed to be the doctrine of Rikoon v. Two Boro Dress, Inc., 9 Misc. 2d 591, affd. 8 A. D. 2d 986, rearg. 9 A. D. 2d 783, lv. to app. den. 7 N. Y. 2d 711. The County Court directed the payment of local taxes, subsequent in time to the lien of the United States Government, as "expenses of the sale" under [fol. 117] Section 1087 of the Civil Practice Act, thus giving such local taxes priority over the government lien. It is difficult to determine whether the decision by the Appellate Division in the Rikoon case was based on that theory or whether the decision was affected by the failure of the United States to appeal from prior orders or to move to vacate the judgment of foreclosure. In any event, the provisions of the New York Civil Practice Act permitting the court to direct that local taxes be paid as expenses of the sale, could not prevail as against the authority of the New Britain case (*cf.* Metropolitan Life Ins. Co. v. U. S., 9 A. D. 2d 356, 1st Dept., 1959).

Furthermore, an analysis of the cases decided since New Britain discloses no indication or tendency on the part

of the higher Federal courts to impair or abrogate the New Britain rule. It has been decided that the question of priority of a Federal lien is to be determined by Federal law but that the property to which such a lien attaches is a matter of state law (Aquilino v. U. S., 3 N. Y. 2d 511, revd. 363 U. S. 509, 1960; U. S. v. Durham Lumber Co., 363 U. S. 522, 1960; see also Mtr. of City of New York (Coblentz), 5 N. Y. 2d 300, cert. den. *sub nom.*; U. S. v. Coblenz, 363 U. S. 841, and U. S. v. Bess, 357 U. S. 51). It has also been held that while local "procedure" should be followed in foreclosing a mortgage (U. S. v. Brosnan and Bank of America v. U. S., 363 U. S. 237, 1960), such "procedure" cannot cut off a right expressly granted to the Federal Government by Congress (U. S. v. John Hancock [fol. 118] Mut. Life Ins. Co., 364 U. S. 301, 1960). See also the note in Reports of American Bar Association, 1959, Vol. 84, pp. 661-664.

Inasmuch as County Court failed to follow the determination and intent of our opinion and order, when this case was last before us, we have set forth precisely the provisions to be contained in the modified judgment.

Certain provisions that should be included in the order, which may be of interest are as follows:

> "Ordered, Adjudged and Decreed that the mortgaged premises described in the complaint * * * be sold at public auction * * *; that said referee execute to the purchaser or purchasers on such sale a deed of the premises sold; and that said sale shall be made free and clear of all liens. It is further
>
> "Ordered, Adjudged and Decreed * * *
>
> "That said referee forthwith, upon receipt of the proceeds of sale or any part thereof, deposit the same in his own name as referee, in the Liberty Bank of Buffalo, and that said referee, after the delivery of said deed, pay from the moneys so deposited the referee's legal fees, the allowance to the Special Guardian and Designated Attorney, and the lawful advertising expenses, and the plaintiff's costs and disbursements as heretofore adjudged, with interest from the date hereof.
>
> [fol. 119] "That out of the net proceeds of the sale then remaining, the referee shall set aside the sum found

to be due upon the plaintiff's mortgage with interest thereon as aforesaid, and also a sum sufficient to pay other outstanding liens, if any, which are superior to the tax lien of the United States by reason of their accrual prior to the time of filing of the United States line, with interest, in a separate bank account in his name, to be designated the 'Priority Adjustment Fund.' In the event of any uncertainty or dispute as to the amounts or priorities of said liens, the referee shall apply to the County Court for directions, upon notice to all interested parties.

"From the balance remaining, if, any, after the setting aside of the said sum, the said referee shall pay the tax lien of the United States, filed on January 15, 1953, with interest, or so much thereof as he is able to pay out of the said balance.

"From the balance remaining, if any, after such payment to the United States, the refree shall pay all local real estate taxes and assessments and water rates which are liens upon the property sold, and pay the cost of redeeming said property from any real estate taxes, assessments and water rates which had not apparently become absolute, the liens of all such taxes, assessments and water rates being inferior to [fols. 120-139] the tax lien of the United States, having accrued subsequent to the time of the filing of the United States tax lien. If there are insufficient moneys available to pay such real estate taxes and assessments and water rates, the balance thereof remaining unpaid shall be paid out of the Priority Adjustment Fund above directed to be set aside.

"If there be a surplus remaining after making the payments in accordance with the foregoing directions, the referee shall deposit the same, within five days after its ascertainment, with the Liberty Bank of Buffalo, to the credit of this action, but subject to the further order of the Court herein.

"The referee shall pay out of the Priority Adjustment Fund the amount owing to the plaintiff as heretofore adjudged, and thereafter the amount of each of the other liens for which the said sums was so set aside,

in order of their priority, or so much thereof as the sums so set aside shall be sufficient to pay. * * *"

The judgment appealed from must be modified accordingly.

* * * * * * *

[fol. 140] In the County Court—Erie County, State of New York

Modified Judgment of Erie County Court—June 13, 1961

The above named defendant, United States of America, having appealed to the Appellate Division of the Supreme Court in and for the Fourth Judicial Department, from the judgment of the County Court, Erie County, entered in the Office of the Clerk of the County of Erie on June 9, 1959; [fol. 141] and the said appeal having been duly heard, and the said Appellate Division having thereupon by its order dated June 29, 1960, duly unanimously ordered and adjudged that the said judgment, insofar as appealed from, be reversed on the law and in the exercise of discretion and the case be remitted to this Court for further proceedings in accordance with the opinion of said Appellate Division, without costs to any party; and the said order of reversal having been duly filed in the office of the Clerk of said Appellate Division on July 1, 1960; and a copy of said Order, together with notice of entry thereon, having been duly served on the same day on Messrs. Little and Burt, the attorneys for the said plaintiff, and Neil R. Farmelo, Esq., the attorney for the defendant, United States of America, and the remittitur and record on appeal together with certified copies of said order of reversal having duly been remitted to the Office of the Clerk of the County of Erie, and duly filed on the 8th day of July, 1960; and a resettled judgment dated October 20, 1960, having been made by this Court pursuant to said order of June 29, 1960, and duly entered in the Office of the Clerk of the County of Erie, on October 20, 1960, and the defendant, United States of America, having appealed to the Appellate Division, Fourth Department, from the resettled judgment entered October 20, 1960, in the Office of the Clerk of the County of Erie,

and the said appeal having been heard at a Term of the Appellate Division, Fourth Department, on the 16th day of February, 1961, and the Appellate Division, Fourth De-
[fol. 142] partment, by its Order dated May 9, 1961, and entered in the office of the Clerk of the Appellate Division, Fourth Department, May 18, 1961, having unanimously modified said judgment on the law without costs; and a copy of said Order, together with notice of entry thereof having been duly served on Messrs. Little and Burt, the attorneys for plaintiff, and Neil R. Farmelo, Esq., the attorney for the defendant, United States of America, and the remittitur and record on appeal together with a certified copy of said Order of Modification having been duly remitted to the Clerk of the County of Erie, and duly filed on the 23rd day of May, 1961;

Now, on motion of Little and Burt, attorneys for the plaintiff, it is hereby,

Ordered, that said Order of modification of the Appellate Division, Fourth Department, dated May 9, 1961, be and the same hereby is made the Order of this Court; and it is further

Ordered and Adjudged that the said resettled judgment of this Court dated October 20, 1960, and entered in the Office of the Clerk of the County of Erie on October 20, 1960, be and the same hereby is modified in accordance with the Order of the Appellate Division, Fourth Department, dated May 9, 1961, in manner following:

Ordered, Adjudged and Decreed, that there is due on said mortgage the sum of One Thousand Five Hundred
[fol. 143] Sixty and 13/100 Dollars ($1,560.13), the sum so due as aforesaid, with interest thereon from the 12th day of March, 1959, and the plaintiff is entitled to have herein the sum of Three Hundred Twenty-seven and 90/100 Dollars ($327.90) as taxed by the Clerk of the Court and hereby adjudged to the plaintiff for costs and disbursements in this action, with interest thereon from the date hereof; and it is further

Ordered, Adjudged and Decreed, that Evan E. James, Esq., is awarded the sum of One Hundred Dollars ($100.00) in full of his services as Guardian *ad Litem* and Designated Attorney herein; and it is further

Ordered, Adjudged and Decreed, that the mortgaged

premises described in the complaint in this action as hereinafter set forth, be sold at public auction in the westerly vestibule of the Erie County Hall, Buffalo, New York, by or under the direction of Robert W. McNaulty of the Town of Orchard Park, in the County of Erie, New York, who is hereby appointed referee for that purpose; that said referee give public notice of the time and place of such sale, according to law and the course and practice of this Court; that the plaintiff, or any other party to this action, may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed of the premises sold; and that said sale shall be made free and clear of all liens; and it is further

[fol. 144] Ordered, Adjudged and Decreed that the purchaser or purchasers at such sale be let into possession on production of the referee's deed or deeds.

That said referee forthwith, upon receipt of the proceeds of sale or any part thereof, deposit the same in his own name as referee, in the Liberty Bank of Buffalo, and that said referee, after the delivery of said deed, pay from the moneys so deposited the referee's legal fees, the allowance to the Special Guardian and Designated Attorney, and the lawful advertising expenses, and the plaintiff's costs and disbursements as heretofore adjudged, with interest from the date hereof.

That out of the net proceeds of the sale then remaining, the referee shall set aside the sum found to be due upon the plaintiff's mortgage with interest thereon as aforesaid, and also a sum sufficient to pay other outstanding liens, if any, which are superior to the tax lien of the United States by reason of their accrual prior to the time of filing of the United States lien, with interest, in a separate bank account in his name to be designated the "Priority Adjustment Fund". In the event of any uncertainty or dispute as to the amounts or priorities of said liens, the referee shall apply to the County Court for directions, upon notice to all interested parties.

From the balance remaining, if any, after the setting aside of the said sum, the said referee shall pay the tax lien [fol. 145] of the United States, filed on January 15, 1953, with interest, or so much thereof as he is able to pay out of the said balance.

From the balance remaining, if any, after such payment

to the United States, the referee shall pay all local real estate taxes and assessments and water rates which are liens upon the property sold, and pay the cost of redeeming said property from any real estate taxes, assessments and water rates which had not apparently become absolute, the liens of all such taxes, assessments and water rates being inferior to the tax lien of the United States, having accrued subsequent to the time of the filing of the United States tax lien. If there are insufficient moneys available to pay such real estate taxes and assessments and water rates, the balance thereof remaining unpaid shall be paid out of the Priority Adjustment Fund above directed to be set aside.

If there be a surplus remaining after making the payments in accordance with the foregoing directions, the referee shall deposit the same, within five days after its ascertainment, with the Liberty Bank of Buffalo, to the credit of this action, but subject to the further order of the Court herein.

The referee shall pay out of the Priority Adjustment Fund the amount owing to the plaintiff as heretofore adjudged, and thereafter the amount of each of the other liens for which the said sum was so set aside, in order of their priority, or so much thereof as the sum so set aside shall be sufficient to pay.

[fol. 146] That said referee shall make a report of such sale and file it with the Clerk of Erie County; and if the proceeds of such sale, distributed as herein directed, be not sufficient to pay the amount due to the plaintiff, with interest, in full, that said referee specify the amount of such deficiency in his report of sale and that the defendant Beverly Victory, as Administratrix of the Estate of Joseph B. Victory (also known as Joseph Victory), deceased, pay the same to the plaintiff, and upon application, as required by law, that the plaintiff have judgment and execution therefor, or so much thereof as the Court may determine to be best and equitable.

That in case the plaintiff becomes the purchaser of said mortgaged premises at said sale, or in the event that the rights of the purchaser at said sale and the terms of sale under this judgment shall be assigned to or shall be acquired by the plaintiff and a valid assignment thereof be delivered to said referee, said referee shall not require the

plaintiff to pay in cash the entire amount bid at said sale, but shall execute and deliver to the plaintiff a deed of the premises sold upon the payment to said referee of the amounts hereinbefore specified as taxed by the Clerk of the Court and adjudged to the plaintiff for costs and disbursements with interest thereon from the date hereof, the referee's fees, advertising expenses and the allowance to the Special Guardian and Designated Attorney, and the amount necessary to pay the aforesaid real estate taxes, assessments and water rates and interest and penalties [fol. 147] thereon and the amount necessary to redeem the property sold from any sales for unpaid real estate taxes, assessments or water rates, and the amount which would become payable to the United States upon its tax lien under the directions hereinabove set forth, and the amount, if any, payable to other lienors whose liens were superior to that of the United States under the direction hereinabove set forth, or in lieu of the payment of said amounts, upon delivery to the referee of receipts showing the payment thereof. If, after allowing the plaintiff credit for the amount due upon its mortgage and interest and credit for the aforesaid payments, there shall remain of the amount so bid a surplus over and above the amounts so credited, the plaintiff shall pay to said referee upon delivery to it or its assigns of said referee's deed the amount of such surplus and the referee shall deposit such sum in said depository as hereinbefore directed.

That the said referee take the receipt of the plaintiff or its attorneys and of the other parties or persons to whom payments were made as hereinbefore directed, and file the same with his report of sale; that he deposit the surplus moneys, if any, with the Liberty Bank of Buffalo within five days after the same shall have been received by him to the credit of this action to be withdrawn only on the Order of this Court; and it is further

Ordered, Adjudged and Decreed, that each and all of the defendants in this action and all persons claiming under [fol. 148] them or any or either of them, after the filing of the notice of pendency of this action, be and they hereby are forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the said mortgaged premises and each and every part thereof, except as

to the one year period of redemption granted the defendant, United States of America, by Section 2410 of Title 28 of the United States Code Annotated.

The following is a description of the said mortgaged premises hereinbefore mentioned:

All that Tract or Parcel of Land situate in the City of Buffalo, County of Erie and State of New York, bounded and described as follows:

Commencing at a point in the northerly line of Lyth Place, three hundred forty-three and two-tenths (343.2) feet westerly from its intersection with the westerly line of Jefferson Street; running thence westerly along said line of Lyth Place Twenty-four and four-tenths (24.4) feet; thence northerly at right angles one hundred twenty (120) feet to a point midway between the northerly line of Lyth Place and the south line of Northland Avenue, formerly Puffer Street; thence easterly along the line midway between said lines of Lyth Place and Northland Avenue, formerly Puffer Street, twenty-four and four-tenths (24.4) feet; thence southerly at right angles one hundred twenty (120) feet to the northerly line of Lyth Place at the place of beginning.

[fol. 149] Subject to restrictions and rights of utilities of record affecting said premises.

Together With all the right, title and interest of the mortgagor of, in and to the land lying in the bed of any street, road, avenue, lane or right of way as they now exist or formerly existed in, in front of or adjoining the said premises, and in and to all easements, riparian rights and appurtenances and all the estate and rights of the mortgagor in and to said premises.

Together With all fixtures and articles of personal property, now or hereafter attached to, and used in connection with, the above described premises, all of which are covered by said mortgage.

Burke I. Burke, Erie County Judge.

Granted: June 13th, 1961.

O. E. Mueller, Special Deputy Clerk.

[fol. 150] In the Court of Appeals of New York

Buffalo Savings Bank, Appellant,

v.

Beverly Victory, Individually and as Administrator of the Estate of Joseph Victory, Deceased, et al., Defendants, and United States of America, Respondent.

* * * * * * *

Opinion—February 22, 1962

Thomas G. Rickert for Erie County Savings Bank, *amicus curiae*.

Burke, J. The issue here is whether the payment of local real estate taxes and assessments as expenses of sale, rather than the application of that amount toward the payment of a Federal lien filed against the mortgagor prior to the accrual of local taxes, disregards the alleged right of the tax lien of the United States to prior payment.

We find that the Federal tax lien is not entitled to priority over subsequently accrued local tax liens—superior to the mortgage debt—since the respective liens are not comparable charges on real property and the "mortgagee" has an absolute preference over Federal liens.

Plaintiff commenced this action in October, 1958 to foreclose its real property mortgage given by Joseph B. Victory, dated and recorded April 5, 1946. At the time of verification of the complaint there was a balance due on the bond [fol. 151] of $1,473.75, with interest at the rate of 5% per annum from January 10, 1958. The United States was *made a party because of a tax lien it filed in the Erie County Clerk's office January 15, 1953 against the mortgagor, since deceased.* Its answer stated a balance due on the lien of $689.07, plus interest. Plaintiff did not advance any sums for payment of local real property taxes and assessments, which became liens upon the land on and after July 1, 1957.

The mortgagee moved for summary judgment providing that the premises be sold free of the United States tax lien, but *subject* to all real property taxes and assessments. This motion was granted by the Erie County Court. On

appeal by the respondent, the Appellate Division reversed and remitted the case to the County Court, stating that the discretionary authority to have the property sold *subject* to all local real estate taxes "may not properly be exercised in a case such as this in which there is a problem of circular priorities" (11 A D 2d, 160). Thereafter the County Court once more granted summary judgment in favor of the mortgagee providing that the premises be sold and directing that the Referee "shall, as a part of the expenses of the sale, pay out of the proceeds of said sale all real estate taxes, assessments and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid real estate taxes, assessments or water rates which have not apparently become absolute." The judgment further foreclosed all rights, liens, and equities of redemption in the premises, except as to the one-year period of redemption granted to the United States by section 2410 of title 28 of the United States Code.

On appeal by the United States, the Appellate Division modified the judgment by providing that "the rule of priorities laid down in *United States* v. *New Britain* (347 U. S. 81) applies" (13 A D 2d 208), and that the local tax liens were not to be paid as expenses of the sale.

The appellant mortgagee contends that the foreclosure procedure of New York is determined by our State law and that a direction to pay local taxes and assessments as expenses of the sale was a proper direction within section 1087 of the New York Civil Practice Act. The United States contends that this court is barred from reaching a determination reversing the Appellate Division and affirming the judgment of Erie County Court. (*United States* v. *New Britain*, 347 U. S. 81.)

Although the United States Supreme Court in recent years has passed on the question of priority of liens and the resulting effect upon mortgagees, their decisions provide no clear command governing us here.

The case of *United States* v. *New Britain* (*supra*) is distinguishable from the present case.

[fol. 152] There the Supreme Court assumed, in the posture of the case as it reached that court, that the contest was between the local government and the Federal Government over their respective rights in surplus funds.

In the usual case, as here, however, the state of facts shows that the dispute is really between the mortgagee and creditors of the mortgagor. The debts of the mortgagor obviously can only be satisfied out of such equity in the real property as the mortgagor may have. When the property is sold in foreclosure, the equity of the mortgagor is extinguished except in the event the bid provides a surplus. Any interest of the mortgagor is fully protected. The mortgagor can bid at the sale, bring surplus money proceedings and resist a deficiency judgment by adducing proof that the value of the property exceeded the bids. In New York State the local government is not paid out of the surplus as the mortgage is subject to its liens, but the Federal Government as a creditor of the mortgagor can look only to the surplus for the satisfaction of its lien. The local government lien is not a levy against the mortgagor, but against the land and must be paid together with other costs from whatever funds the sale of the land produces before (if there were no creditors of the mortgagor) any claimed interest of the mortgagor could be asserted. Our State law has not characterized the nature and extent of the Federal tax lien, but has determined the nature and extent of the property interests of the taxpayer (admittedly a State function), which in the case of real property is conditioned upon the payment of annually recurring governmental land taxes, the payment of which may not be avoided by a foreclosure sale. Of course, the Federal Government's claim, which is based on the claimed interest of the mortgagor, can have no better standing, that is, the Federal lien is also to be paid when there is a surplus in which the mortgagor would have an interest. It would manifestly be unjust to require a mortgagee to pay a creditor of a mortgagor when it appears that the mortgagor had no equity in the real property.

In the *New Britain* suit (*supra*) the court, at the outset, held that the contestants were vying over rights to funds which were considered as surplus. Federal liens securing unpaid withholding and unemployment taxes and insurance contributions owed by the mortgagor attached to his interest in the property subsequent to two mortgages and a judgment lien, but prior to city liens for unpaid real estate and water taxes. Connecticut law provided that the statutory liens for real estate taxes and water rent took prece-

dence over all other liens or incumbrances. Mr. Justice MINTON, speaking for the court, conceding that the mort- [fol. 153] gagee had a preference, stated at pages 85-86: "It does not follow, however, that the City's liens must receive priority as a whole. We believe that priority on these statutory liens is determined by another principle of law, namely, 'the first in time is the first in right.' * * * We think that Congress had this cardinal rule in mind when it enacted § 3670, a schedule of priority not being set forth therein. Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate."

Although it may have been the clear intent of Congress that this Federal tax lien have a priority determined by the timeliness with which it attached to the interest of the mortgagor in the real property, *New Britain* does not indicate that it was the intent of Congress to upset established State procedures in foreclosure actions or curtail the absolute preference granted to mortgagees. The statement (p. 88) that "The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors" is far too removed, in the light of the real issue here, from the court's interpretation of congressional intent to have any relation thereto.

Not to be lost sight of in its discussion of the relative priority of the liens is the court's statement that Congress intended to assert the Federal lien "as to any funds *in excess of the amount* necessary to pay the mortgage and judgment creditors." (*United States* v. *New Britain*, 347 U. S. 81, 88, *supra;* italics supplied.) The Supreme Court there recognized that the mortgagor's interest in the proceeds of the foreclosure sale, and consequently the United States lien, reaches only surplus moneys.

But such surplus funds cannot be created by the judgment, for they are the moneys paid for the land in excess of the amount decreed in the judgment. A judgment which omits an item of sale expense in order to create a surplus fund to which subsequent liens can attach violates the statute. Rights of lienors in surplus funds are to be protected, but the law of this State cannot be subverted to create a surplus where none might otherwise exist. Our State law does not prevent such lienors from bidding at a foreclosure

sale in order to protect their liens; but, inasmuch as they are not forced to bid a sum which will create a surplus, it would be inequitable to force the foreclosing mortgagee to bid an inflated price creating a surplus through the scheme of "circular priorities".

In this case the respondent's claim that its lien, founded on the interest of the defaulting mortgagor in the real property, should be granted a priority over the lien on the land, concededly superior to not only the mortgagor's interests in the realty but the mortgagee's interest as well, [fol. 154] depends on the obviously fallacious contention that the lien of the municipality upon the land is akin to the lien of the Federal Government as a creditor of the mortgagor. The plain answer is that the Federal Government is only the creditor of a debtor whose interest in the land is subordinate to the local government lien, which need not be reduced to judgment nor perfected by a filing in the County Clerk's office. As a lien for taxes for essential services supplied for the benefit of the land, it attached directly to the particular parcel of real property. The Federal lien was filed in the Clerk's office against a presumed equity in the real property held by the mortgagor. This respondent imagines a surplus, which is as yet non-existent, against which it would press a lien arising from a debt owed to it by the mortgagor. But in a foreclosure suit the equity of the mortgagor upon which a Federal lien depends should be established according to law, not by an ipse dixit.

The real estate tax and water-rent liens are not liens which attach to the property merely because of an unconnected indebtedness of the owner of the land, as are Federal tax liens. The property itself, in its very nature as land, incurs the indebtedness. It matters not who owns the land for, even if the United States in foreclosing its lien had a Receiver appointed to sell the land, the property could not have been transferred free and clear of the local tax liens attaching while the United States was in possession (see *Borock* v. *City of New York*, 268 F. 2d 412).

Thus, the circumstances in the present case are quite different from those assumed in *United States* v. *New Britain* (*supra*). The question is not "the relative priority of statutory federal and municipal liens to the proceeds of

a mortgage foreclosure sale of the property to which the liens attached" (*United States* v. *New Britain, supra*, p. 82), but whether the payment of the Federal lien filed against the mortgagor should be mandated where there is no evidence that the mortgagor has a financial interest at the time of foreclosure. Here we are faced with the true parties in interest—the mortgagee and the Federal Government. Under New York law no funds are deemed surplus until the expenses of the sale, the costs of the action and the amount of the foreclosed mortgage debt plus interest have been fully paid. (Civ. Prac. Act, § 1082). The [fol. 155] procedure[1] in this State requires the officer conducting the foreclosure sale to pay out of the proceeds all taxes, assessments and water rates which are liens on the property, unless the judgment directs otherwise. These payments are expenses of the sale by statute. Therefore, the question of what, if any, financial interest the mortgagor-taxpayer had on which the Federal Government had a lien can only be determined under the State law after the foreclosure sale.

The procedure adopted by the Appellate Division does not follow New York State procedure. Up to the present time the expenses of sale have always been determined by State, rather than Federal, law, and even the judgment in *New Britain* (*Brown* v. *General Laundry Serv.*, 19 Conn. Supp. 335) recognized that the expenses of sale have prior-

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[1] (Civ. Prac. Act, § 1087)—"Where a judgment rendered in an action to foreclose a mortgage upon real property directs a sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold and redeem the property sold from any sales for unpaid taxes, assessments or water rates, which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale within the meaning of that expression as used in any provision of this article. The provisions of this section shall not apply to any judgment in an action wherein any municipal corporation of this state is the plaintiff and the purchaser at the foreclosure sale thereunder."

ity over any other claim to the moneys realized on the sale. Certainly precedent demands that we should reaffirm the principle that State procedures govern.

Moreover, the Supreme Court in a recent decision has allowed State law to control the procedure of foreclosure and payment of liens. In *United States v. Brosnan* (264 F. 2d 762, affd. 363 U. S. 237) Federal tax liens attached to property subject to a purchase-money mortgage, but prior to local tax liens.[2] Upon default in payment of the mortgage, the mortgagee caused a confession of judgment to be entered on the bond. A writ of *fieri facias* for the sale of the property issued to the Sheriff. The United States was not a party to this action. "The sheriff held the sale of the property on January 3, 1956; it was bid in by Brosnan and Jacob [assignees of the mortgagee] for $6,203 and, it is presumed, the discharge of the mortgage indebtedness. *The amount of the bid went to satisfy* costs of the sale, and for various outstanding local taxes." (264 F 2d 764; emphasis supplied.)

More than a year later the United States brought an action to enforce its lien, but the District Court (164 F. Supp. 357) and the Court of Appeals for the 3d Circuit (264 F. 2d 762, *supra*) held that the junior lien of the Government was extinguished even though the United States had not been joined as a party. The Supreme Court affirmed the determinations below (363 U. S. 237). The opinion was replete with references to State law and procedure—something not found in *New Britain*.

The Supreme Court's attention was drawn to the fact that Pennsylvania gave its own tax liens more favorable treatment than it rendered the Federal liens at pages 25-27 [fol. 156] of the United States' brief: "Indeed, Pennsylvania law itself treats state tax liens more favorably than federal tax liens. A Pennsylvania statute provides that 'The lien of all taxes * * * against any real estate within this

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[2] The Federal liens, amounting to $40,403.34 attached to the property between April 11, 1949 and November 28, 1951 (Exhibit B to complaint of United States). The local taxes paid out of the proceeds of the sale were county, township and school taxes for the period 1952-1955 in the amount of $5,756.90 (Transcript of Record, p. 22).

Commonwealth shall be divested by any judicial sale of such land: Provided, The amount of the purchase money shall equal the amount of the said taxes.' (Purdon's Penna Statutes Annotated, Title 53, Section 7104, Appendix, *infra*, p. 36). While Pennsylvania law permits discharge of a junior lien on realty through foreclosure of a prior mortgage at a sheriff's sale, the Commonwealth's liens may be divested only to the extent permitted by statute [cases cited]. Thus, under Pennsylvania law the state's tax lien will be discharged through foreclosure only if the state's tax claim is paid in full out of the proceedings. The decision below holds, however, that the same foreclosure proceeding wipes out the federal lien even though the United States receives not a single penny toward payment of its claim."

The dissent makes it clear that the objection to Pennsylvania procedure in extinguishing the lien of the Federal Government was not that it was done according to State procedure, but that Pennsylvania procedure did not provide for notice to junior lienors (363 U. S. 261).

Although the main facet of the *Brosnan* case was a sanction of Pennsylvania's procedure, whereby the United States was not required to be a party to the action in order to extinguish its lien, the affirmance also necessarily sanctioned that State's procedure of paying local taxes out of the proceeds of the sale without the necessity of creating a surplus with which to pay liens prior to the local tax liens. (Purdon's Pennsylvania Statutes Ann., tit. 53, §§ 7103-7105.) This is a departure from the holding in the *New Britain* case, as that case is construed by the respondents. The Supreme Court in *Brosnan* also gave effect to the preference accorded to mortgagees by State and Federal law, and the decision tends toward the principle stated in the dissenting opinion of Haynsworth, J., in *United States* v. *Bond* (279 F. 2d 837, 848, cert. den. 364 U. S. 895).

According to respondent's reasoning, the mortgagee, concededly not under any obligation to pay the Federal lien on the interest of the mortgagor at the time the lien was filed, becomes obligated when it bids in at the foreclosure sale simply because the mortgagee as bidder under State law must bear the cost of unpaid local taxes on the land falling due subsequent to the filing of the Federal lien. This imposition of liability is justified on the assumption that at

the time of foreclosure the undetermined financial interest of the mortgagor has a value at least equal to the amount of the unpaid taxes which fell due subsequent to the filing of the Federal lien.

The circumstances present in the case of the foreclosure of a real estate tax lien by a municipality illustrate best the [fol. 157] paradoxical result of the application of the rule respondent asserts. Under that rule the municipality which is foreclosing the tax lien for local taxes, which accrued subsequent to the filing of a tax lien filed against the equity of the property owner, shall be obligated to discharge the Federal tax lien in order to secure a clear title. But the interest of such a property owner obviously is worthless, since neither the property owner nor the public would bid on the tax lien which the municipality ultimately had to foreclose. In spite of this evidence of lack of value, the respondent would contend that the Federal lien has a priority because the nonexistent financial interest of the property owner cannot be diminished by giving priority to local taxes accrued subsequent to the filing of the Federal lien and that, therefore, the municipality must satisfy the Federal lien. In other words, the financial interest of the property owner which was nil develops value through the default of the property owner on local taxes. This *nonsequitur* had to be resorted to because respondent realizes its lien is not a lien on the land, but is only a lien on the equity of the owner. Therefore it had to invent an equity which the owner could be said to possess at the time of the foreclosure in order to avoid the controlling State law which provides that the nature and extent of the property interests of a defaulting mortgagor can only be determined after a foreclosure sale conducted according to the State laws. The patent infirmity of this contrivance explains why the respondent has improperly invoked a canon, in a matter involving disparate liens, which is relevant only to the relationships of kindred liens, i.e., "the first in time is the first in right."

Such a rule, if accepted now, would adversely affect the credit rating of all municipal bonds which are marketed on the assumption that local taxes are a first lien on the land within the municipality. It would also impair the borrowing power of municipalities because it makes the munici-

pality liable for the personal debts a tax delinquent property owner owes to the Federal Government. Finally, it would cloud the title of properties which the municipalities have resold after acquisition through tax lien foreclosures.

The logic of the respondent appears to be as circular as the type of priority that it would have this court stamp with approval. The procedure that it proposes is novel to this State. Were local taxes not owing upon the land, the United States could not, through its own admissions, compel the creation of a surplus in which its lien would share with the judgment creditors. Is it logical that the Federal Government should be entitled to compel the mortgagee to treat the amount of real estate taxes subsequently accruing as a surplus to be applied toward payment of the Federal lien? [fol. 158] To accede to this attempt to foist the personal debts of the mortgagor owing to the United States on the mortagee is to agree to the imposition of an indirect tax on savings banks who have invested billions of dollars in mortgages and on the savings of our citizens invested in mortgages which have been accorded a preference even under Federal law (U.S. Code, tit. 26, § 6323, subd. [a]). If the preference is to be whittled down, it should be done explicitly by a statute enacted by the representatives of the States in the national Congress and not by the courts.

The direction in the resettled judgment of foreclosure that the Referee should pay the real estate taxes, assessments and water rates out of the proceeds of the sale as expenses of the sale is not only in conformity with State law (Civ. Prac. Act, § 1087), but is also in keeping with the preference conferred on the mortgagee by State and Federal law protecting "all those rights which the Congress must have known the mortgagee commonly and usually possesses" (*United States v. Bond*, 279 F. 2d 837, 851, *supra*). Being the proper procedure of this State, the resettled judgment of foreclosure of October 20, 1960 should be affirmed.

The judgment of the Appellate Division, entered June 13, 1961, should be reversed and the judgment of the County Court, Erie County, entered October 20, 1960, reinstated, without costs.

FULD, J. (dissenting). By its present decision, the court is holding that a Federal tax lien filed against a mortgagor

prior to the accrual of local real estate taxes and assessments—which are superior to the mortgage debt—is not entitled to priority over those subsequently accrued local liens." I cannot agree. In my view, the conclusion reached by the majority is opposed by controlling authority. (*See United States v. New Britain*, 347 U. S. 81; see, also, *United States v. Bond*, 279 F. 2d 837 [4th Cir.]; *United States v. Christensen*, 269 F. 2d 624 [9th Cir.]; *Stadelman v. Hornell Woodworking Corp.*, 172 F. Supp. 156 [U. S. Dist. Ct., W. D. N. Y.]; *United States v. Laird*, 155 F. Supp. 105 [U. S. Dist. Ct., N. H.]; *Union Central Life Ins. Co. v. Peters*, 361 Mich. 283.) Nor may the impact of such authority be avoided by having the State, through legislative enactment or court decision, label local taxes and assessments "expenses of the sale," that is, of the mortgage foreclosure sale following the action brought by the mortgagee (Civ. Prac. Act, § 1087).

Once it has been determined, under State law, that the taxpayer has property or rights to property, "state law is inoperative to prevent the attachment of liens created by [fol. 159] federal statutes in favor of the United States." (*United States v. Bess*, 357 U. S. 51, 57.) Moreover, when a Federal tax lien has attached to property of the taxpayer, as undoubtedly it has here, State law may not destroy it. (*See Commissioner v. Stern*, 357 U. S. 39.) As already indicated, calling the local taxes "expenses of the sale" does not help the local taxing authority, for it is to substance, not form, that the courts look. Local taxes do not result from the mortgage foreclosure sale; on the contrary, they are pre-existent to the sale. Accordingly, the State's characterization of them as "expenses of the sale"—appropriate though it may be for the State's own purposes—is thoroughly unreal in our present context and completely ineffectual to affect the priority of the Federal lien. (Cf. *United States v. Gilbert Associates*, 345 U. S. 361.)

In deciding questions concerning the relevant priorities of a Federal tax lien and other liens, it is perfectly clear that State law determines the nature and extent of the property interests of the taxpayer and the Federal law determines the priority of the competing claims themselves. (See, e.g., *Aquilino v. United States*, 363 U. S. 509, 515-516; *United States v. Brosnan*, 363 U. S. 237, 240; *United States*

v. *Bess*, 357 U. S. 51, 55, *supra*; *United States* v. *Acri*, 348 U. S. 211, 213.) Although the court's opinion herein does not expressly reject this proposition—as to the proper role of State and Federal law in this area—its decision stands squarely opposed to it. What the court has done, under State law, is to characterize the nature and extent of the Federal lien and determine its priority in competition with local liens—a function exclusively reserved to the Federal law. (See *Aquilino* v. *United States*, 363 U. S. 509, *supra*.) Thus, the majority describes the Government's status in the present action as that merely of "a creditor of the mortgagor" and concludes that, since the Government's position "is based on the claimed interest of the mortgagor, [it] can have no better standing [than the mortgagor], that is, the Federal lien is also to be paid when there is a surplus [over mortgage debt plus local taxes] in which the mortgagor would have an interest" (opinion, p. 37). To employ the language of the opinion in the *Brosnan* case, this is not an authorized State determination of the "'property and rights to property' * * * to which a government tax lien attaches," but rather an unauthorized State determination of "matters directly affecting the nature or operation of [federal tax] liens" (363 U. S. 237, 240).

Furthermore, giving priority to the after-accrued local taxes, as the majority is here doing, is directly contrary to the Supreme Court's decision in *United States* v. *New Britain* (347 U. S. 81, *supra*). In that case, in addition to prior mortgages and a prior judgment lien, the taxpayer's [fol. 160] property was incumbered by a Federal tax lien and, subsequent in time to such lien, by a municipal tax lien. The Connecticut Supreme Court reasoned, as the majority does here, that, since Federal law subordinated the Federal tax lien to mortgage and judgment liens and since, under State law, these mortgage liens were subordinated to real property tax liens, the Federal tax lien had to be subordinated to the local real property tax lien. (See *Brown* v. *General Laundry Serv.*, 139 Conn. 363, 373.) In answer to this argument, the Supreme Court of the United States declared (347 U. S., at p. 88):

> "We do not agree. The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors.

> That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien."

Even more recently, in *United States* v. *Brosnan* (363 U. S. 237, *supra*), the Supreme Court, citing numerous decisions, "rejected" the very position taken by the majority in this case (363 U. S., at p. 241):

> "This Court has repeatedly rejected the contention that because a fee owned by a taxpayer was already encumbered by a lien which enjoyed seniority under state law, the Government's lien necessarily attached subject to that lien."

The rule adopted in the *New Britain* case as the Federal rule for resolving conflicts between a Federal tax lien and local real property tax liens is the olden one that "'the first in time is the first in right'" (347 U. S., at p. 85). As there pointed out, "When the debtor is insolvent, Congress has expressly given priority to the payment of indebtedness owing the United States, whether secured by liens or otherwise, by § 3466 of the Revised Statutes, 31 U. S. C. (1946 ed.) § 191. In that circumstance, where all the property of the debtor is involved, Congress has protected the federal revenues by imposing an absolute priority." Where, however, the court continued (p. 85), "the debtor is not insolvent, Congress has failed to expressly provide for federal priority, with certain exceptions not relevant here." (And see Internal Revenue Code of 1939, U. S. Code, tit. 26, § 3672; Internal Revenue Code of 1954, U. S. Code, tit. 26, § 6323).[1] And, added the court, "There is nothing in the language of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the [fol. 161] specific categories of interests set out therein" (p. 88), that is, mortgagees, judgment creditors, pledgees and purchasers. Accordingly, the relative priority of each

[1] It is appropriate to note at this point that the record before us, like the record in *New Britain* (347 U. S., at p. 85), does not indicate that the mortgagor taxpayer was insolvent.

lien here involved "must depend upon the time [each of them] attached to the property in question and became choate" (p. 86. See, also, *United States* v. *Bond*, 279 F. 2d 837, *supra*; *United States* v. *Christensen*, 269 F. 2d 624, *supra*).

The court seeks to distinguish *New Britain* from the present case on the ground that the contest there "was between the local government and the Federal government over their respective rights in surplus funds," whereas here the "facts [show] that the dispute is really between the mortgagee and creditors of the mortgagor" (opinion, p. 36). Starting from this premise, the majority urges that, if the contest were between the Federal Government and the local taxing authorities, *New Britain* would control and the Government would prevail. But, since the dispute here is between the United States, as a creditor of the Mortgagor, and the mortgagee, the latter must prevail, because (the argument proceeds) the Government can have no better standing than the mortgagor himself. And the court seeks to bolster this conclusion by claiming that "the respective liens [in this case] are not comparable charges on real property" (p. 35). In my judgment, the proffered ground for distinction is not tenable.

It is true that in *New Britain* the contest was between the city and the Federal Government but, as the facts disclosed and later developments made clear (see *Brown* v. *General Laundry Serv.*, 19 Conn. Supp. 335), the real parties in interest were the Federal Government and private lienors of the debtor's real estate who were entitled to priority over the Federal lien by the express terms of the Federal lien statutes. The State of Connecticut received its taxes in full at the expense of lienors whose liens were prior to those of the Federal Government. The fact that the contest in *New Britain* was between the city and the Federal Government and in this case between the mortgagee and the Government neither compels nor justifies a difference in result.

As I have already noted, it is the majority's assertion that the lien for local taxes must take precedence over the Government's lien because the respective liens are not comparable charges on real property. This is its position (pp. 36-38): On the one hand, "The local government lien is not a levy against the mortgagor, but against the land."

On the other hand, the Federal Government's status is only that of "a creditor of the mortgagor," its claim merely one "based on the claimed interest of the mortgagor." And its lien, rather than being a lien which "attach[es] directly to the particular parcel of real property" as does that of the [fol. 162] local government, "attach[es] to the property merely because of an unconnected indebtedness of the owner of the land." In other words, the Federal lien is not against the land, but "against a presumed equity in the real property held by the mortgagor."

Having made these distinctions, the court goes on to suggest that the difference in the way these liens arise assures priority to the liens of the local taxing authorities over the lien of the Federal Government. From this and the status ascribed to the Federal lien, it is the court's conclusion that "the Federal government's claim, which is based on the claimed interest of the mortgagor, can have no better standing [than the mortgagor's claim], that is, the Federal lien is also to be paid when there is a surplus [above the mortage debt and expenses of sale, including local taxes] in which the mortgagor would have an interest" (opinion, p. 37).

The fallacy of this argument, I venture, is that it mistakes the Federal law with respect to the status and incidence of the Federal interest. The Federal Government is no mere unsecured creditor of a delinquent taxpayer. It is, rather, the holder of "a lien * * * upon all property or rights to property, whether real or personal, belonging to such person" (Internal Revenue Code of 1954, U. S. Code, tit. 26, § 6321). Such a lien attaches to the real property owned by the taxpayer at the time the "[tax] assessment is made" (U. S. Code, tit. 26, § 6322), not to whatever equity he may have in it after a subsequent mortgage sale. In short, the Federal lien is not, as the majority insists, "against a presumed equity in the real property held by the mortgagor," but against the land itself. The rights of the Federal Government to the proceeds of the mortgage sale are not, therefore, limited to those of the mortgagor.

Let me state the matter somewhat differently. The lien of the United States arose when the assessments were made, and it attached to the mortgaged property at that time. Consequently, if the sale of the property had then been

held, that lien could have been satisfied out of the proceeds of such sale after payment of proper expenses and of the amount then due on the mortgage plus interest to the date of payment. The local taxes here involved had not yet come into being and might never have become liens against the property. They might have been paid by the mortgagor or the property *might have been foreclosed before* they became due. Since, therefore, the liens of the local authorities had at best only a potential existence, we do not reach the question whether those liens were choate when the Federal liens attached. It comports neither with reality nor with law to give such "potential liens" priority over the pre-existing matured Federal lien by labeling them "expenses of the sale" in foreclosure proceedings.

[fol. 163] Indeed, an argument very similar to that made by the court here, namely, that the respective charges of the Federal Government and the local taxing authorities are "not comparable charges on real property"; was expressly made and rejected in the *New Britain* case (347 U. S. 81, *supra*). It had evidently been argued that the local tax liens should take precedence over the Federal tax lien because they were "specific" while the Federal lien was "general". With respect to this contention, the Supreme Court declared (p. 84):

> "[T]he fact that one group of liens [the local] is specific and the other [the federal] general in and of itself is of no significance in these cases . . . . Thus, the general statutory liens of the United States are as binding as the specific statutory liens of the City. The City gains no priority by the fact that its liens are specific while the United States' liens are general."

Finally, a word must be said about the majority's characterization of the decision in *United States* v. *Brosnan* (363 U. S. 237, *supra*) as "a departure" from the holding in the *New Britain* case. In the first place, *Brosnan* was concerned with a question whether a Federal tax lien could be extinguished under a State procedure for foreclosure in which the Federal Government, *a junior lienor*, was not, and need not have been, a party; what was involved, therefore, was not the problem of priority at issue here. In the second place, although local taxes had been paid out

of the proceeds of the mortgage sale and thus had, in effect, achieved priority, that issue was never raised on appeal, the sole issue being—to cull from the court's opinion—"whether the federal lien was effectively extinguished by state proceedings to which the United States was not, nor was required under state law to be a party" (363 U. S., at pp. 238-239). The third and (to me) conclusive reason why *Brosnan* may not be taken to be a departure from the *New Britain* holding is that in *Brosnan* the Supreme Court actually cited *New Britain* with approval (363 U. S., at p. 241, n. 4) and restated one of the principles which it had announced; thus, it wrote in *Brosnan* (p. 241): "This Court has repeatedly rejected the contention that because a fee owned by a taxpayer was already encumbered by a lien which enjoys seniority under state law, the Government's lien necessarily attached subject to that lien". As is evident, far from supporting the majority view in the present case, the opinion in *Brosnan* stands with *New Britain* to refute it.

In the sum, then, in situations of this kind, the lien of the Federal Government must be recognized as prior in right to that of the local taxing authorities. This follows from the fact that it is prior in time. But this does not mean that those local taxing authorities will not collect their [fol. 164] taxes. The majority opinion has placed the contest in its proper setting. The dispute is between the mortgagee and the Federal Government as a creditor of the mortgagor. The local taxing authorities will be paid at the expense of the mortgagee so there will be no adverse economic impact upon the taxing authorities. The mortgagee's interest in the proceeds of the mortgage sale may, perhaps, be diminished. But the mortgagee is not left without recourse where the mortgagor is liable for payment of the debt secured by the mortgage and he is not insolvent. In such a case, the mortgagee may collect the "residue" or balance due from the mortgagor by way of a deficiency judgment (Civ. Prac. Act, §§ 1082, 1083).

I would affirm the judgment of the Appellate Division.

Chief Judge Desmond and Judges Dye, Froessel and Van Voorhis concur with Judge Burke; Judge Fuld dissents in an opinion in which Judge Foster concurs.

Judgment of Appellate Division, entered June 13, 1961, reversed and judgment of the County Court, Erie County, entered October 20, 1960, reinstated, without costs.

[fol. 165] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 22nd day of February in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

Witness, The Hon. Charles S. Desmond, Chief Judge, Presiding. Raymond J. Cannon, Clerk.

REMITTITUR — February 22, 1962

[fol. 166]

BUFFALO SAVINGS BANK, Appellant,

vs.

BEVERLY VICTORY, INDIVIDUALLY &c., & ors., &c., Defendants,

UNITED STATES OF AMERICA, Respondent.

Be it Remembered, That on the 27th day of September in the year of our Lord one thousand nine hundred and sixty-one, Buffalo Savings Bank, the appellant in this cause, came here unto the Court of Appeals, by Little & Burt, its attorneys; and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And United States of America, the respondent in said cause, afterwards appeared in said Court of Appeals by Neil R. Farnedo, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 167] Whereupon, The said Court of Appeals having heard this cause argued by Mr. John H. Little, of counsel for the appellant, and by Mr. C. Donald O'Connor, of

counsel for the respondent, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein, entered June 13, 1961, be and the same hereby is reversed and the judgment of the County Court, Erie County, entered October 20, 1960, reinstated, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Erie County, there to be proceeded upon according to law.

[fol. 168] Therefore, it is considered that the said judgment be reversed &c. as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Erie County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.
Albany, February 22, 1962.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 169] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 922

UNITED STATES, Petitioner,

vs.

BUFFALO SAVINGS BANK

ORDER ALLOWING CERTIORARI—June 11, 1962

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.